

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

FOR MR. JUSTICE GEORGE

*Jeff. Case
jurisdiction of
BD of Tax ap
Money for
to return*

TRANSCRIPT OF RECORD

*question
multi*

Court of Appeals of the District of Columbia

JANUARY TERM, 1932

No. 5613

150

THE CAPITOL BUILDING & LOAN ASSN.,
APPELLANT,

vs.

DAVID BURNET, COMMISSIONER OF INTERNAL
REVENUE.

APPEAL FROM THE BOARD OF TAX APPEALS.

FILED FEBRUARY 17, 1932.

PRINTED APRIL 13, 1932

5613

The following decisions are cited in support of the principle that a return duly sworn to which contains all of the items of income and deduction necessary to a computation of the tax is a return within the meaning of the various revenue acts.

Florsheim Bros. Dry Goods Co. v. United States, 280 U.S. 453.

Lucas v. Pilliod Lumber Co., 281 U.S. 245.

Commissioner v. Stetson & Ellison Co. (C.C.A. 3d), 43 F.(2d) 553.

United States v. National Tank & Export Co. (C.C.A. 5th),
45 F.(2d) 1005, certiorari denied, 283 U.S. 839.

Helen R Carlon

Court of Appeals of the District of Columbia

JANUARY TERM, 1932

No. 5613

THE CAPITOL BUILDING & LOAN ASSN.,
APPELLANT,

vs.

DAVID BURNET, COMMISSIONER OF INTERNAL
REVENUE.

APPEAL FROM THE BOARD OF TAX APPEALS.

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Court of Appeals of the District of Columbia

No. 5613.

THE CAPITOL BUILDING & LOAN ASSN., Appellant,

vs.

DAVID BURNET, Commissioner of Internal Revenue.

1

Docket No. 36283.

THE CAPITOL BUILDING & LOAN ASSN., Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Appearances:

For Petitioner: L. L. Hamby, Esq.

For Respondent: J. A. Adams, Esq., Frank A. Surine, Esq.

Docket Entries.

1928.

Mar. 8. Petition received and filed. Taxpayer notified.
Fee paid.

Mar. 9. Copy of petition served on General Counsel.

May 1. Motion for extension to 7/8/28 to answer filed by
General Counsel—granted.

May 22. Answer filed by General Counsel.

May 24. Copy of answer served on taxpayer—General Calendar.

1931.

Feb. 12. Stipulation of facts filed, with leave to file arguments within 60 days.

Feb. 12. Motion to submit upon stipulation between counsel with leave to file briefs within 60 days filed by both parties.

1931.

Feb. 12. Stipulation between counsel to have statements and affidavits received as evidence filed.

Feb. 17. Order granting motion of Feb. 12, 1931 and assigning proceeding to Mr. Trammell, Division 2, and that parties may on or before 4/11/31 file written brief pursuant to said motion entered.

Apr. 6. Memorandum brief filed by General Counsel.

Apr. 11. Brief filed by taxpayer.

June 24. Opinion rendered—Mr. Trammell, Division 2. Judgment will be entered under Rule 50 for 1924 and 1926.

July 13. Supplemental opinion rendered—Mr. Trammell, Division 2. Order of dismissal will be entered as to the year 1925.

July 14. Decision entered—Division 2—as to year 1925.

Oct. 6. Computation under Rule 50 filed by taxpayer.

Oct. 7. Notice of settlement filed by General Counsel.

Oct. 13. Decision entered—Mr. Trammell, Division 2.

Dec. 19. Stipulation of venue filed.

Dec. 19. Petition for review by District Court of Appeals with assignments of error filed by taxpayer.

Dec. 19. Præcipe filed.

Dec. 21. Proof of service of petition filed.

Dec. 29. Proof of service of præcipe filed.

2 Filed Mar. 8, 1928, United States Board of Tax Appeals.

United States Board of Tax Appeals.

Docket No. 36283.

THE CAPITOL BUILDING & LOAN ASSOCIATION, Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Petition.

Your petitioner, The Capitol Building & Loan Association, respectfully represents:

I. That it is and at all times in the petition named was a corporation organized and existing under and by virtue of the laws of the State of Kansas relating to building and loan associations with its office and place of business at

Topeka in said State, and that by letter dated January 9, 1928, respondent notified your petitioner of an alleged deficiency in its liability for income taxes for the calendar years 1924, 1925 and 1926 in the amounts of \$11,630.50, \$9,165.54 and \$5,729.49, respectively, as set forth in the said deficiency letter, copy of which is annexed hereto as a part hereof.

3 II. Respondent in his aforesaid determination of the liability of your petitioner resulting in the alleged deficiency aforesaid committed the following errors:

(1) In determining the liability of your petitioner and the alleged deficiency for the calendar years 1924 and 1925 respondent has made his determination and finding contrary to and without applying the provisions of Section 231(4) of the Revenue Act of 1924 in that he has failed to exempt your petitioner from liability for the payment of such taxes as a domestic building and loan association substantially all of whose business was confined to making loans to its members.

(2) In determining the liability of your petitioner and the alleged deficiency for the calendar year 1926 respondent has made his determination and finding contrary to and without applying the provisions of Section 231(4) of the Revenue Act of 1926 in that he has failed to exempt your petitioner from liability for the payment of income taxes as a domestic building and loan association substantially all of whose business was confined to making loans to its members.

4 III. The facts upon which your petitioner relies in support of its appeal are as follows:

1. During the calendar years 1924, 1925 and 1926 inclusive your petitioner was and for many years prior thereto had been a building and loan association organized under the laws of the State of Kansas as such building and loan association and conducting and carrying on its business in conformity with the laws of the said State of Kansas relating to building and loan associations, and was during the said period a domestic building and loan association within the purview and meaning of the laws of the said State and during the said period it confined its business substantially to the making of loans to its members and during said

period was within the meaning of the aforesaid sections of the Revenue Acts of 1924 and 1926, as they respectively apply, a domestic building and loan association substantially all of whose business was confined to the making of loans to its members.

IV. The proposition of law upon which your petitioner relies in support of its appeal is as follows:

(1) Within the purview and meaning of Section 231(4) of the Revenue Act of 1924 your petitioner was a domestic building and loan association substantially all of whose business was confined to making loans to its members during the years 1924 and 1925 and as such was exempt from liability for the payment of income taxes; and within the purview and meaning of the Revenue Act of 1926 your petitioner was, during the calendar year 1926, a domestic building and loan association substantially all of whose business was confined to making loans to its members and as such was exempt from liability for the payment of income taxes.

V. In consideration of the premises your petitioner prays that this Board shall hear and determine its appeal; that it will find that during the calendar years 1924, 1925 and 1926 your petitioner was exempt from the payment of income taxes under the provisions of Section 231(4) of the Revenue Act of 1924 in respect of the calendar years 1924 and 1925, and under the provisions of Section 231(4) of the Revenue Act of 1926 in respect of the calendar year 1926; that it will find that there does not exist any deficiency in taxes for any of the said years for which your petitioner is liable; and that your petitioner may have such other and further relief as the exigencies of the petition may require.

THE CAPITOL BUILDING & LOAN
ASSOCIATION,

By CHARLES S. ELLIOTT,

President.

L. L. HAMBY,

Transportation Building,

Washington, D. C.,

Attorney for Petitioner.

6 STATE OF KANSAS, ss:

Personally appeared before me, a notary public in and for the said State, Charles S. Elliott, who, being first duly

sworn, deposes and says that he is President of The Capitol Building & Loan Association above named and is duly authorized to verify the foregoing petition; that he has read the said petition by him subscribed and that the statements therein made are true to the best of his knowledge, information and belief.

Given under my hand and seal of office at Topeka, Kansas, this 5th day of March, 1928.

[NOTARIAL SEAL.] STELLA V. BARNGROVER,
Notary Public, State of Kansas.

My commission expires Jan. 23, 1929.

7 Treasury Department, Washington.

January 9, 1928.

The Capitol Building and Loan Association,
534 Kansas Avenue,
Topeka, Kansas.

SIRS:

The determination of your tax liability for the years 1924, 1925 and 1926 discloses a deficiency of \$12,558.20 for the years 1924 and 1926 and an overassessment of \$122.51 for the year 1925, as shown by the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60 day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:FAR:A5:NMP:60D. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,
Commissioner,
By C. B. ALLEN,
Deputy Commissioner.

Inclosures: Statement, Form A, Form 882.

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Statement.

IT:FAR:A5. NMP:60D

In re Capitol Building and Loan Association, 534 Kansas Avenue, Topeka, Kansas.

Year.	Deficiency.	Over-assessment.
1924	\$11,630.50	
1925		\$122.51
1926	927.70	
Total	\$12,558.20	\$122.51
Net deficiency		\$12,435.69

1924.

Net income reported	\$91,125.83
Additions:	
(1) Taxes	\$1,578.17
(2) Donations	400.00
	<u>1,978.17</u>
	\$93,104.00
Deduction:	
(3) Additional depreciation	60.00
Adjusted net income	<u>\$93,044.00</u>

Explanation of Adjustment.

(1) This item represents adjustment of taxes payable at December 31, 1924.

(2) Donations are disallowed under Article 562 Regulations 65.

(3) Depreciation has been adjusted in accordance with Article 161 Regulations 65.

Computation of Tax.

Net income	\$93,044.00
Tax at 12½%	11,630.50
Original tax	None
Deficiency	\$11,630.50

The difference between the deficiency shown above and that shown in Revenue Agent's report results from the agent allowing you credit for tax assessed in amount of \$11,390.73, whereas the return shows that no tax has been assessed.

9 1925.

Net income reported.....	\$71,446.57
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Additions:

(1) Donations	\$289.50	
(2) Rent received.....	781.82	
		1,071.32

Deductions:

(3) Expense Coffey Company....	138.47	
(4) Taxes Cooper Co. Farm....	111.27	
(5) Insurance Algire Farm.....	4.00	
(6) Additional depreciation.....	181.80	
(7) Taxes	1,578.17	
		2,013.71

Adjusted net income.....	\$70,504.18
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Explanation of Adjustment.

(1) See item (2) for 1924.

(2) This item represents rent received which was erroneously credited to the asset account.

(3) (4) and (5) These items represent allowable deductions which were erroneously charged to asset accounts.

(6) See item (3) for 1924.

(7) See item (1) for 1924.

Computation of Tax.

Net income	\$70,504.18
Tax at 13%	9,165.54
Tax previously assessed, account #401,206	9,288.05
Correct tax liability	9,165.54

1926.

Net income reported	\$35,568.80
10 Brought forward	\$35,568.80

Additions:

(1) Rent	\$60.00
(2) Taxes	109.54
(3) Additional gain on sale of real estate	637.58
(4) Interest on building and loan asso'n shares	6,950.00
	7,757.75
	43,326.55

Deductions:

(5) Additional depreciat-n	231.11
(6) Repairs	233.94
(7) Taxes	90.32
(8) Commissions	226.25
(9) Loss on sale of Liberty Bonds	104.25
	\$42,440.68

Explanation of Adjustment.

(1) This item represents rent received which was erroneously credited to "Real Estate" account.

(2) This adjustment represents taxes paid on foreclosure of Wichita property which was erroneously charged to expense instead of real estate account.

(3) This item represents additional gain on sale of real estate not reflected in profit and loss account on books.

(4) Interest received on building and loan association shares is held to be taxable income.

(5) See item (3) for 1924.

(6) (7) and (8). These items represent allowable deductions which were erroneously charged to "Real Estate" account.

(9) This adjustment represents a loss on sale of Liberty Bonds not closed to profit and loss account on the books.

Computation of Tax.

Net income	\$42,440.68
Tax at 13½%	5,729.49
Original Tax	4,801.79
Deficiency	927.70

11 The overassessment shown herein will be made the subject of a Certificate of Overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district and will be applied by that official in accordance with Section 284 of the Revenue Act of 1926.

The right of petition as indicated on Page 1 of this letter refers only to any deficiency in tax indicated herein is as much as there is no provision in the Revenue Act of 1926 granting the right of petition against the determination of any over-assessment found upon a review of your returns.

Payment should not be made until a bill is received from the Collector *in* Internal Revenue for your district and remittance should then be made to him.

12 Filed May 22, 1928, United States Board of Tax Appeals.

United States Board of Tax Appeals.

Docket No. 36283.

THE CAPITOL BUILDING & LOAN ASSOCIATION, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Answer.

The Commissioner of Internal Revenue by his attorney, General Counsel, Bureau of Internal Revenue, for answer to the petition filed by the above-named petitioner, admits and denies as follows:

(1)-(a). Denies all the material allegations contained in paragraph (1) of the petition, except the allegation that the petitioner is a corporation, the allegation that a deficiency letter was mailed to the petitioner on January 9, 1928, and that a copy of said deficiency letter is attached to the petition.

(1)-(b). Denies that the respondent determined a deficiency for the year 1925 as alleged in the petition and denies that the Board has jurisdiction to determine a deficiency for the year 1925.

(2)-1 and 2. Denies that the respondent committed error in the determination of the deficiency as alleged in paragraph (2) of the petition.

(2)-3. Denies that any error was made in the determination of the deficiency referred to in deficiency letter dated January 9, 1928.

(3). Denies all the material allegations contained in paragraph (3) of the petition.

13 (4) Denies generally and specifically each and every allegation in the petitioner's petition contained not hereinbefore admitted, qualified or denied.

Wherefore it is prayed that the petitioner's appeal be denied.

(Signed)

C. M. CHAREST,
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

J. ARTHUR ADAMS,
Special Attorney,
Bureau of Internal Revenue.

14 United States Board of Tax Appeals. Filed Feb.
12, 1931.

United States Board of Tax Appeals.

Docket No. 36283.

THE CAPITOL BUILDING & LOAN ASSOCIATION, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Stipulation.

It is hereby stipulated and agreed by and between the petitioner and the respondent, by their respective attorneys of record, that the petitioner was during the years 1924 and 1926 a domestic building and loan association, substantially all of whose business during the said years 1924 and 1926 was confined to making loans to members; that the following statement shows the petitioner's Federal income tax liability for the years 1924 and 1926:

Year 1924.

Assessment: List May, 1928, Page O, Line 3, No. 2	\$11,630.50
Paid Mar. 31, 1928	\$11,449.05
Paid June 13, 1928	181.45
	11,630.50
Tax liability	None
Overpayment in tax	\$11,630.50
Deficiency in tax	None

Year 1926.

Assessments:

Acct. No. 401310	\$4,801.79
List May, 1928, Page O, Line 4, No. 2	927.70
Total	<u>5,729.49</u>
Paid: June 15, 1927	\$2,400.90
Sept. 12, 1927	1,200.45
Dec. 10, 1927	1,200.44
Mar. 31, 1928	927.70
	<u>5,729.49</u>
Tax liability	None
Overpayment in tax	\$5,729.49
Deficiency in tax	None

15 That for the year 1924 the petitioner was assessed interest in the amount of \$2,132.81, of which the petitioner paid in cash on June 13, 1928, \$2,010.30 and the balance, namely, \$122.51 was paid by a credit (Schedule I. T. 30025) of an overassessment and overpayment made by the petitioner on June 21, 1926 in the amount of \$122.51 for the year 1925; that the petitioner was assessed \$94.94 interest on the federal income taxes assessed for the year 1926 and said interest was paid by the petitioner, \$36.00 on June 15, 1927, and \$58.94 on March 31, 1928; and that the respondent takes the position, on the authority of the Board's order in the case of Rodman Wanamaker and Guaranty Trust Company of New York, Executors of the Estate of James Gordon Bennett, deceased, Docket No. 1122, that the Board does not have jurisdiction to consider and determine any question regarding the interest paid by the petitioner on account of any assessment of federal income taxes having been made by the respondent for the years 1924 and 1926.

It is further stipulated that the following statement of facts may be considered as true and the papers referred to herein and attached hereto may be received as evidence in the case for the purpose of determining whether the Board has jurisdiction to hear and determine the petitioner's federal income tax liability for the year 1925:

1. Petitioner was during the year 1925 a corporation organized under the laws of the State of Kansas.

2. Under date of March 13, 1926, the petitioner filed with the Collector of Internal Revenue a paper entitled "Corporation Income Tax Return for the Calendar Year 16 & 17 1925," attached to which was an affidavit made by the president of the petitioner and the secretary of the petitioner. Said return and affidavit is attached hereto and marked Exhibit "A." The type figures shown on Page 1 of said return, representing the petitioner's income from various sources for the year 1925 and the various deductions claimed by the petitioner for the year 1925, were entered on the return by the petitioner. All other figures and notations made in ink or pencil on Page 1 of said return were made by a person or persons other than the petitioner.

3. On Collector's April, 1926, assessment list, account No. 401206, signed by Commissioner May 26, 1926, an assessment of tax was made against the petitioner in the amount of \$9,288.05 which was based upon the income for the year 1925 as shown in the paper filed by the petitioner with the Collector of Internal Revenue and referred to herein as Exhibit "A." Under date of June, 1926, interest in the amount of \$86.87 was assessed against the petitioner on account of the said federal income tax assessed against the petitioner for the year 1925 in the amount of \$9,288.05. Under date of June 21, 1926, upon notice and demand from Collector, the petitioner paid in cash to the Collector of Internal Revenue \$9,288.05 representing the payment of said federal income tax assessed against the petitioner for the year 1925, and also paid in cash on said date, June 21, 1926, \$86.87 representing interest on said federal income tax of \$9,288.05 assessed for the said year 1925.

17A 4. The original receipt given by the Collector of Internal Revenue to the petitioner showing the payment of federal income tax for the year 1925 in the amount of \$9,288.05 and interest thereon in the amount of \$86.87 is attached hereto and marked Exhibit "B." (Copy of Ex. B attached to Stipulation of Counsel and affidavit—Page 18C.)

5. The petitioner has not at any time filed any claim for abatement or refund of any federal income tax or interest assessed or paid for the year 1925.

6. Under date of January 9, 1928, the respondent mailed the petitioner a letter, attached to which was a statement consisting of four pages. A copy of said letter and statement is attached hereto and marked Exhibit "C". (Copy of Ex. C attached to petition, Page 7.)

It is further stipulated and agreed that either party, with the consent of the Board, may submit written arguments in support of their respective contentions within sixty days from the date this stipulation is filed with the Board.

L. L. HAMBY,

Attorney for Petitioner.

C. M. CHAREST,

General Counsel, Bureau of Internal Revenue,

Attorney for Respondent.

(Here follow pages marked 17B, 17C, 17D, 17E, 17F, 17G, 17H, 17I, and 17J.)

18A United States Board of Tax Appeals. Filed Feb. 12, 1931.

United States Board of Tax Appeals.

Docket No. 36283.

CAPITOL BUILDING & LOAN ASSOCIATION, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Stipulation Between Counsel.

It is hereby stipulated by and between counsel for the petitioner and the respondent respectively that if Charles S. Elliott and C. A. Sterling, whose joint affidavit is hereto annexed, were present as witnesses before the Board upon the submission of the above entitled cause each of them would testify according to the statements set forth in the said affidavit and that said statements, together with Exhibit 1 annexed thereto and referred to therein, may be received and considered by the Board in determining whether it has jurisdiction to redetermine the liability of petitioner for the calendar year 1925 as fully and com-

Computation proved

FILED UNDER 11251

Exhibit A

Doc 36283

Form 1120

U. S. INTERNAL REVENUE

(Auditor's Stamp)

CORPORATION INCOME TAX RETURN

For Calendar Year 1925

File This Return with the Collector of Internal Revenue for Your District on or Before March 15, 1926

PRINT PLAINLY CORPORATION'S NAME AND BUSINESS ADDRESS

CAPITAL BUILDING & LOAN ASSOCIATION

(Name)

6th & Kansas Ave.

(Street and Number)

TOPEKA, KANSAS

(Post office and State)

Date of Incorporation December 16, 1893

Under the Laws of what State or Country

File Code

Serial Number

(Auditor's Stamp)

Cash Check M.O. Cert. of Ind. First Payment

KIND OF BUSINESS

Domestic Building & Loan Association

IS THIS A CONSOLIDATED RETURN? NO

Item and Sub-item

GROSS INCOME

1. Gross Sales from Trading or Manufacturing, Less Returns and Allowances

2. Less Cost of Goods Sold:

(a) Inventory at beginning of year

(b) Merchandise bought for sale

(c) Cost of manufacturing or otherwise producing goods (From Schedule A)

(d) Total of lines (a), (b), and (c)

(e) Less inventory at end of year

3. Gross Profit from Trading or Manufacturing (Item 1 minus Item 2)

4. Gross Profit from Operations Other Than Trading or Manufacturing. (State source of income):

(a)

(b)

(c)

5. Interest on Bank Deposits, Notes, Mortgages, and Corporation Bonds

6. Rents

7. Royalties

8. Profit from Sale of Real Estate, Stocks, Bonds, and other Capital Assets (From Schedule D)

9. Dividends on Stock of Domestic Corporations

10. Other Income (including dividends received on stock of foreign corporations). (State nature of income):

Safe Deposit Rents

(a)

(b)

(c)

11. TOTAL INCOME IN ITEMS 3 TO 10

DEDUCTIONS

12. Compensation of Officers (From Schedule C)

13. Rent on Business Property

14. Repairs (From Schedule D)

15. Interest

16. Taxes (From Schedule E)

17. Losses by Fire, Storm, etc. (From Schedule F)

18. Bad Debts (From Schedule G)

19. Dividends (From Schedule H)

20. Depreciation (resulting from exhaustion, wear and tear, or obsolescence) (From Schedule I)

21. Depletion of Mines, Oil and Gas Wells, Timber, etc.

22. Other Deductions Not Reported Above. (Explain below, or on separate sheet):

(a) Salaries and wages. (Not included in Item 2, 12, or 14 above)

(b) Schedule Attached

(c)

(d)

(e)

(f)

23. TOTAL DEDUCTIONS IN ITEMS 12 TO 22

24. NET INCOME (Item 11 minus Item 23)

COMPUTATION OF TAX

25. Net Income (Item 24 above)

26. Less Credit of \$2,000 (for a domestic corporation having a net income of less than \$25,000)

27. Balance (Item 25 minus Item 26)

28. Income Tax Paid at Source. (This credit can only be allowed to a nonresident foreign corporation)

29. Income and Profits Taxes Paid to a Foreign Country or to a Possession of the United States by a domestic corporation

30. Balance of Tax (Item 27 minus Items 28 and 29)

28. Income Tax (12 1/2% of Item 27)

29. If the Net Income of a Domestic Corporation is Less Than \$25,000, Enter the Amount in Excess of \$25,000

30. Total Tax (Item 28 plus Item 29)

An amended return must be marked "Amended" at top of return

Checks and drafts will be accepted only if payable to order of the collector

In calendar
from 1925

Declared & Verified
Confirmed - MT: CST-Kansas. 6309-JEN-CL-A 61306 - March 7, 1926

IT: E. R. LJM - March 5, 1926
S. 1926

4-6-26
Incl. in 2nd Reg. return

5613 Capital Building & Loan Assn.
vs.
David Burnet, Commissioner

ITEM	BEGINNING OF TAXABLE YEAR				END OF TAXABLE YEAR			
	Amount		Total		Amount		Total	
ASSETS								
1. Cash								
2. Notes receivable								
3. Accounts receivable								
Less reserve for bad debts								
4. Inventories:								
Raw materials								
Work in process								
Finished goods								
Supplies								
5. Investments:								
Obligations of a State, Territory, or any political sub- division thereof, or the District of Columbia								
Securities issued under the Federal Farm Loan Act, or under such Act as amended								
Obligations of the United States or its possessions								
6. Loans (describe fully):								
7. Deferred charges:								
Prepaid insurance								
Prepaid taxes								
8. Capital assets:								
Land								
Buildings								
Machinery and equipment								
Furniture and fixtures								
Delivery equipment								
Less reserves for depreciation and depletion								
9. Patents								
10. Good will								
11. Other assets (describe fully):								
12. TOTAL ASSETS								
LIABILITIES								
13. Notes payable								
14. Accounts payable								
15. Accrued expenses (describe fully):								
16. Other liabilities (describe fully):								
17. Capital stock:								
Preferred stock (less stock in treasury)								
Common stock (less stock in treasury)								
18. Surplus								
19. Undivided profits								
20. TOTAL LIABILITIES								

Remarks

6613 Capital Building & Loan Assn.
vs.
Appellant
David Burnett, Commissioner *PC*

5613 Capital Building & Loan Assn.
vs. Appellant
David Burnet, Commissioner

State of Kansas,)
County of Shawnee,) SS.

Charles S. Elliott, President and C. A. Sterling
Secretary of The Capitol Building and Loan Association
of Topeka, Kansas, being first duly sworn deposes and states:

THAT this Association contends that it is a domestic
building and loan Association within the purview of the Revenue
Act of (1918, 1921, 1924 or 1926 as the case may be) and as
such is not subject to the tax imposed by the said act. The
Association, however, to avoid the imposition of any penalty
and not desiring to in any manner evade any duty imposed upon
it by law, hereby files its return as provided by the said
Revenue Act in a case in which it would be liable to file
such return, intending by all lawful means to resist the pay-
ment and collection of any income taxes that may be assessed
against it and if assessed against it and collected, to pro-
cure a refund thereof.

Further affiant saith not.

President.

Charles S. Elliott
Secretary.

Subscribed and sworn to before me a Notary Public this
11th day of March, 1926.

Stella V. Barngrover
Notary Public.

Commission expires: Jan. 23. 1929

Q 3

**SPAULDING F. GLASS
AND COMPANY
CERTIFIED PUBLIC ACCOUNTANTS**

WASHINGTON, D. C.
KANSAS CITY, MO.
INDEPENDENCE, KANS.

**CAPITAL BUILDING AND LOAN ASSOCIATION
TOPEKA, KANSAS**

**INCOME TAX SCHEDULES
1925**

K - BALANCE SHEETS

5613 Capital Building & Loan Assn.
vs.
Appellant
David Burnet, Commissioner

	1924		1925	
	Per Books December 31	Corrected December 31	Per Books December 31	Corrected December 31
ASSETS				
Loans to Members on Real Estate	\$ 5,699,554.00	\$ 5,699,554.00	\$ 6,879,443.00	\$ 6,879,443.00
Loans to Non-Mbrs. on Real Estate	232,241.84	232,241.84	213,328.93	213,328.93
Rural Credit Loans	203,633.03	203,633.03	183,191.88	183,191.88
Loans on Stock	74,464.76	74,464.76	92,993.56	92,993.56
Other Securities	869,554.54	869,554.54	1,422,877.43	1,422,877.43
Real Estate Owned (1)	12,034.64	8,000.00	16,125.20	12,090.56
Due on Real Estate Contracts	80,319.30	80,319.30	75,286.92	75,286.92
Furniture & Fixtures (2)		21,808.53	3,000.00	26,265.54
Office Building (3)	255,000.00	294,100.33	245,000.00	294,100.33
Delinquent Taxes paid for Borrowers (4)	16,401.20	16,653.98	28,690.80	28,943.58
Cash on Hand & in Banks	430,144.49	430,144.49	271,290.60	271,290.60
Kansas Bankers Stock (5)		1,250.00		1,250.00
Judgments	11,459.29	11,459.29	20,888.18	20,888.18
Contract on other Real Estate (6)		3,171.36		3,171.36
	\$ 7,884,807.09	\$ 7,946,355.45	\$ 9,452,116.50	\$ 9,525,121.87

LIABILITIES				
Directors Salaries	1,656,716.61	\$ 1,656,716.61	\$ 1,783,629.88	\$ 1,783,629.88
Installment Stock	394,027.93	394,027.93	523,615.60	523,615.60
Prepaid Stock	178,833.77	178,833.77	189,624.80	189,624.80
Deposit Stock	4,828,178.06	4,828,178.06	6,181,900.06	6,181,900.06
Rural Credit - Full Paid	285,489.00	285,489.00	176,973.00	176,973.00
Due Borrowers	89,592.14	89,592.14	98,918.57	98,918.57
Res. for Depr. Furniture & Fixtures (7)		4,537.99		5,739.85
Accrued Taxes (8)		3,805.98		4,419.69
Permanent Stock	300,000.00	300,000.00	300,000.00	300,000.00
Undivided Profits (9)	79,620.33	126,917.27	71,964.78	123,021.16
Special Surplus				
Permanent Stock	12,349.25	12,349.25	10,489.81	10,489.81
Contingent Fund (10)	60,000.00	60,026.30	115,000.00	115,026.30
Res. for Depr. Building (11)		5,881.15		11,763.15
	\$ 7,884,807.09	\$ 7,946,355.45	\$ 9,452,116.50	\$ 9,525,121.87

a 4

5613 Capital Building & Loan Assn.
vs. Appellant
David Burnet, Commissioner **pc**

**SPAULDING F. GLASS
AND COMPANY**
CERTIFIED PUBLIC ACCOUNTANTS

WASHINGTON, D. C.
KANSAS CITY, MO.
INDEPENDENCE, KAN.

CAPITOL BUILDING AND LOAN ASSOCIATION
TOPEKA, KANSAS

INCOME TAX SCHEDULES
1925

22 B - OTHER DEDUCTIONS

Directors Fees	\$ 925.00
Appraisers Fees	165.61
Legal and Court Costs	494.67
Insurance	13.41
Advertising	7,343.75
Stationery	3,654.17
Bonus X	4,090.00
Postage	317.90
Professional Service	1,338.82
Calendars	2,179.32
Over and Short	713.29
Sundry	6,311.92

\$ 27,547.86 ✓

5613 Capital Building & Loan Assn.
vs. Appellant
David Burnet, Commissioner *rc*

SPALDING F. GLASS
AND COMPANY
CERTIFIED PUBLIC ACCOUNTANTS

WASHINGTON, D. C.
KANSAS CITY, MO.
INDIANAPOLIS, IND.

CAPITOL BUILDING AND LOAN ASSOCIATION
TOPEKA, KANSAS

INCOME TAX SCHEDULES
1925

X - EXPLANATION OF BALANCE SHEET CHANGES

		December 31 1924	December 31 1925
(9) Undivided Profits			
Per Books		\$ 79,620.33	\$ 71,964.78
Plus Adjustments to 12-31-24	\$ 99,895.13	99,895.13	
Furn. Charged Off 1925	1,457.01		
Office Building Chg. Off 1925	10,000.00		111,352.14
		179,515.46	183,316.92
Less Adjustments to 12-31-24	52,598.19	52,598.19	
Depreciation Furn. & Firt. 1925	1,201.86		
" Office Building 1925	5,882.00		
Accrued Taxes 1925	4,419.69		
Accrued Taxes 1924	3,805.98		60,295.76
Corrected Balances		\$ 123,917.27	\$ 123,021.16
(10) Contingent Fund			
Per Books		\$ 60,000.00	\$ 115,000.00
Adjustments to 12-31-24		26.30	26.30
Corrected Balances		\$ 60,026.30	\$ 115,026.30
(11) Reserve for Depreciation Building			
Per Books		-	-
Adjustments to 12-31-24	\$ 5,881.15	5,881.15	
Depreciation	5,882.00		11,763.15
Corrected Balances		\$ 5,881.15	\$ 11,763.15

a 6

**SPALDING F. GLASS
AND COMPANY
CERTIFIED PUBLIC ACCOUNTANTS**

WASHINGTON, D. C.
KANSAS CITY, MO.
INDEPENDENCE, KANS.

**CAPITOL BUILDING AND LOAN ASSOCIATION
TOPEKA, KANSAS**

**INCOME TAX SCHEDULES
1925**

X - EXPLANATION OF BALANCE SHEET CHANGES

		December 31 1924	December 31 1925
(1) Real Estate Owned			
Per Books		\$ 12,034.64	\$ 16,125.20
Plus Adjustments to 12-31-24		15,966.76	15,966.76
		28,001.40	32,091.96
Less Adjustments to 12-31-24		20,001.40	20,001.40
Corrected Balances		\$ 8,000.00	\$ 12,090.56
(2) Furniture and Fixtures			
Per Books		\$	\$ 3,000.00
Plus Adjustments to 12-31-24	\$ 24,223.34	24,223.34	
Furn. & Fixt. Charged off 1925	1,457.01		25,680.35
			28,680.35
Less Adjustments to 12-31-24		2,414.81	2,414.81
Corrected Balances		\$ 21,808.53	\$ 26,265.54
(3) Office Building			
Per Books		\$255,000.00	\$245,000.00
Plus Adjustments to 12-31-24	\$ 54,916.38	54,916.38	
Charge Off 1925	10,000.00		64,916.38
		309,916.38	309,916.38
Less Adjustments to 12-31-24		15,816.05	15,816.05
Corrected Balances		\$294,100.33	\$294,100.33
(4) Delinquent Taxes paid for Borrowers			
Per Books		\$ 16,401.20	\$ 28,690.80
Plus Adjustments to 12-31-24		325.20	325.20
		16,726.40	29,016.00
Less Adjustments to 12-31-24		72.42	72.42
Corrected Balances		\$ 16,653.98	\$ 28,943.58
(5) Kansas Bankers Stock			
Per Books		-	-
Plus Adjustments to 12-31-24		1,250.00	1,250.00
Corrected Balances		\$ 1,250.00	\$ 1,250.00
(6) Contracts on Other Real Estate			
Per Books		-	-
Plus Adjustments to 12-31-24		3,171.36	3,171.36
Corrected Balances		\$ 3,171.36	\$ 3,171.36
(7) Reserve for Depreciation Furniture and Fixtures			
Per Books		-	-
Plus Adjustments to 12-31-24	\$ 4,580.08	4,580.08	
" Depreciation 1925	1,201.86		5,781.94
		4,580.08	5,781.94
Less Adjustments to 12-31-24		42.09	42.09
Corrected Balances		\$ 4,537.99	\$ 5,739.85
(8) Accrued Taxes			
Per Books		-	-
Accrued as at December 31		3,805.98	4,419.69
Corrected Balances		\$ 3,805.98	\$ 4,419.69

5613 Capital Building & Loan Assn.
vs. Appellant
David Burnet, Commissioner

SCHEDULE A—COST OF MANUFACTURING OR PRODUCING GOODS (See Instruction 2)

Item	Amount	Item	Amount (Enter as Item 10)
Salaries and wages	\$		\$
Material and supplies			

SCHEDULE B—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 8)

1. Kind of Property	2. Date Acquired	3. Amount Received	4. Depreciation Previously Allowed	5. Cost	6. Value as of March 1, 1913	7. Subsequent Improvements	8. Net Profit (Enter as Item 9)
		\$	\$	\$	\$	\$	\$

State how property was acquired

SCHEDULE C—COMPENSATION OF OFFICERS (See Instruction 12)

1. Name of Officer	2. Official Title	3. Time Devoted to Business	4. Shares of Stock Owned		5. Amount of Compensation (Enter as Item 13)
			4. Common	5. Preferred	
C. S. Elliot	President		1200		\$ 5,040 00
C. A. Sterling	Secretary (11 Mos.)		16		3,650 00
Daisy S. McFarland	Asst. Secty.		13		2,377 00
W. L. Hamilton			11		2,325 00
C. S. Blakely	Auditor				940 00
Bennett R. Wheeler	Vice Pres.		65		880 00
Roy H. McQue	Asst. Secty.				337 50
G. G. Dunge, Jr.					337 50
J. L. Marsh	Serv. (1 Mo.)		52		333 00

SCHEDULE D—COST OF REPAIRS (See Instruction 14)

1. Item	2. Amount (Enter as Item 14)
Salaries and wages	\$

SCHEDULE E—TAXES PAID (See Instruction 16)

1. Item	2. Amount (Enter as Item 16)
Capital Stock	\$ 11,267 78
Personal	2,658 54
Revenue Stamps	9,332 93
	23,159 25

SCHEDULE F—EXPLANATION OF LOSSES BY FIRE, STORM, ETC. (See Instruction 17)

1. Kind of Property	2. Date Acquired	3. Cost	4. Value as of March 1, 1913	5. Subsequent Improvements	6. Depreciation Previously Allowed	7. Insurance and Salvage Value	8. Deductible Loss (Enter as Item 17)
		\$	\$	\$	\$	\$	\$

State how property was acquired

SCHEDULE G—BAD DEBTS (See Instruction 18)

1. Year	2. Sales on Account	3. Bad Debts
1920	\$	\$
1921		
1922		
1923		
1924		

SCHEDULE H—DIVIDENDS DEDUCTIBLE (See Instruction 19)

1. Name of Corporation	Amount of Dividends	
	2. Domestic	3. Foreign
	\$	\$

SCHEDULE I—EXPLANATION OF DEDUCTION FOR DEPRECIATION (See Instruction 20)

1. Kind of Property (If building, state material of which constructed)	2. Date Acquired	3. Age When Acquired	4. Periods Left After Acquisition	5. Cost	6. Value as of March 1, 1913	Amount of Depreciation Charged	
						7. Previous year	8. This year
Furniture & Fixtures	Various		20 Yr.	\$ 21,806 53		\$ 4,537 99	\$ 1,080 43
Furniture Additions	1925		20 Yr.	4,457 01			111 43
Office Building	1923-1924		50 Yr.	294,100 33		5,881 25	5,882 00
						10,439 24	7,062 45

Attach a separate sheet if any of the above schedules do not provide sufficient space

5613 Capital Building & Loan Assn.
 vs. Appellant
 David Burnet, Commissioner

SCHEDULE L—RECONCILIATION OF NET INCOME AND ANALYSIS OF CHANGES IN SURPLUS

1. Net income from Item 24, page 1 of the return						
2. Non-taxable income:						
(a) Interest on obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia		8	128	14		
(b) Interest on securities issued under the Federal Farm Loan Act, or under such Act as amended						
(c) Interest on obligations of the United States or its possessions						
(d) Dividends distributable under Section 20(a) 5 of the Revenue Act of 1924						
(e) Proceeds of life insurance policies paid upon the death of the insured						
(f) Other items of non-taxable income (to be detailed):						
(1) Municipal Bonds		4	445	23		
(2)						
(3)						
3. Charges against reserve for bad debts, if Item 24, page 1 of return, is not an addition to a reserve						
4. Charges against reserve for contingencies, etc. (to be detailed):						
(a)						
(b)						
(c)						
5. Total of Lines 1 to 4, inclusive						
6. Total from Line 14			7	416	05	
7. Net profit for year as shown by books, before any adjustments are made thereto (Line 6 minus Line 5)						
8. Surplus and undivided profits as shown by balance sheet at close of preceding taxable year						
9. Other credits to surplus (to be detailed):						
(a)						
(b)						
(c)						
10. Total of Lines 7 to 9, inclusive			80	500	00	
11. Total from Line 17						
12. Surplus and undivided profits as shown by balance sheet at close of taxable year (Line 10 minus Line 11)						
13. Unallowable deductions:						
(a) Donations, gratitudes, and contributions						
(b) Interest and profits paid to the United States, and so much of each time paid to its possessions or foreign countries as are claimed as a credit in Item 24, page 1 of the return						
(c) Special improvement taxes tending to increase the value of the property assessed						
(d) Furniture and fixtures, additions, or betterments treated as expenses on the books						
(e) Replacements and renewals						
(f) Insurance premiums paid on the life of any officer or employee where the corporation is directly or indirectly a beneficiary						
(g) Interest on indebtedness incurred or continued to purchase or carry obligations or securities (other than obligations of the United States issued after September 24, 1917, and originally subscribed for by the corporation) the interest upon which is wholly exempt from taxation						
(h) Additions to reserve for bad debts which are not included in Item 24, page 1 of return						
(i) Additions to reserve for contingencies, etc. (to be detailed):						
(1)						
(2)						
(3)						
(4) Other unallowable deductions (to be detailed):						
(1) Premiums on Bonds			7	416	05	
(2)						
(3)						
14. Total of Line 13						
15. Dividends paid during the taxable year (state whether paid in cash, stock of this company, or other property):						
(a) Date paid June 30 Character Cash			12	750	00	
(b) Date paid Dec. 31 Character Cash			12	750	00	
(c) Date paid Character						
(d) Date paid Character						
16. Other debits to surplus (to be detailed):						
(a) Contingent Reserve			40	000	00	
(b) Tax Reserve			15	000	00	
(c)						
17. Total of Lines 15 and 16				80	500	00

QUESTIONS

1. By means of the key letters given below, identify the corporation's main income-producing activity with one of the general classes, and follow this by a special description of the business sufficient to give the information called for under each general class.

A.—Agriculture and related industries, including fishing, logging, ice harvesting, etc., and also the leasing of such property. State the product or products. B.—Mining and quarrying, including gas and oil wells, and also the leasing of such property. State the product or products. C.—Manufacturing. State the product and also the material if not implied by the name of the product. D.—Construction—excavations, buildings, bridges, railroads, ships, etc., also equipping and installing same with systems, devices, or machinery, without their manufacture. State nature of structures built, materials used, or kind of installations. E1.—Transportation—rail, water, local, etc. State the kind and special product transported, if any. E2.—Public utilities—gas (natural, coal, or water); electric light or power (hydro or steam generated); heating (steam or hot water); telephone; waterworks or power. E3.—Storage—without trading or profit from sales (elevators, warehouses, stockyards, etc.). State product stored. E4.—Leasing transportation or utilities. State kind of property. F.—Trading in goods bought and not produced by the trading concern. State manner of trade, whether wholesale, retail, or commission, and product handled. State with storage with profit primarily from sales. G.—Service—domestic, including hotels, restaurants, etc.; amusements; other professional, personal, or technical services. State the service. H.—Finance, including banking, real estate, insurance. I.—Concerns not falling in above classes (a) because of combining several of them with no predominant business, or (b) for other reasons.

2. Concerns whose business involves activity falling in two or more of the above general classes, where the same product is concerned, should report business as identified with but one of the above general classes; for example, concerns in A or B which also transport and market their own product exclusively or mainly, should still be identified with classes A or B; concerns in C (manufacturing) which own or control their source of material supply in A or B and which also transport, sell, or install their own product exclusively or mainly, should be identified with manufacturing; concerns in D may control or own the source of supply of materials used exclusively or mainly in their constructive work; concerns in E1 or E2 may own or control the source of their material or power; concerns in F may transport or store their own merchandise, but the production would identify them with A, B, or C.

3. Answers:
(a) General class (use key letter designation) H
(b) Main income-producing business (give specifically the information called for under each key letter, also whether acting as principal, or as agent on commission; state if inactive or in liquidation)
Domestic Building & Loan Association

AFFILIATIONS WITH OTHER CORPORATIONS
SEE INSTRUCTION 24

4. Does the corporation own 95 per cent or more of the outstanding voting capital stock of another domestic corporation or of other corporations? No.

5. Is over 95 per cent or more of your outstanding voting capital stock owned by another corporation? No.

6. Is 95 per cent or over of your outstanding voting capital stock as well as 95 per cent or over of the outstanding voting capital stock of another corporation or of other corporations owned or controlled by the same individual or partnership or by the same individuals, partnerships, or corporations in substantially the same proportion? No.

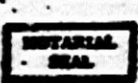
7. If the answer to questions 4, 5, and 6, or to any of them, is "yes," answer the following:

(a) Did the corporation file Form 819, Affiliated Corporations Questionnaire, for 1917 or subsequent taxable years? No. If the answer to this question is "yes," a questionnaire is not required, except under the circumstances described in question (b). If the answer to this question is "no," and the answer to questions 4, 5, and 6, or to any of them, is "yes," procure from the Collector of Internal Revenue for your district Forms 861, 862, 863, and 863A, Affiliations Schedules 1, 2, 3, and 4, which shall be filled in and filed as a part of this return. If the answer to this question is "no," question (b) need not be answered.

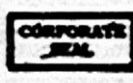
AFFIDAVIT

We, the undersigned, president and treasurer of the corporation for which this return is made, being severally duly sworn, each for himself depose and say that this return, including the accompanying schedules and statements, has been examined by him and is, to the best of his knowledge and belief, a true and complete return made in good faith, for the taxable year as stated, pursuant to the Revenue Act of 1924 and the Regulations issued under authority thereof.

Sworn to and subscribed before me this 11 day of March, 1928.



Stella S. Barnhouse Notary Public
(Signature of officer administering oath)



Charles S. Elliott President
Chas. S. Elliott Secretary
David Burnett Treasurer

Commission Expires Jan. 23-1929 29

6613 Capital Building & Loan Assn.
vs. Appellant
David Burnett, Commissioner

pletely as though the statements contained in the said affidavit had been actually testified to by each of the affiants therein named.

L. L. HAMBY,

Attorney for Petitioner.

(S.)

C. M. CHAREST,

General Counsel, Bureau of Internal

Revenue, for the Respondent.

18B United States Board of Tax Appeals.

Docket No. 36283.

CAPITOL BUILDING & LOAN ASSN., Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Affidavit of Chas. S. Elliott & C. A. Sterling.

Chas. S. Elliott and C. A. Sterling, being first duly sworn, depose and say that they, as president and secretary, respectively, of the Capitol Building & Loan Association, the above-named petitioner, know as such and of their own personal knowledge that from March 13, 1926, the date the petitioner filed with the Collector of Internal Revenue at Wichita, Kansas, a paper entitled "Corporation Income Tax Return for the Calendar year 1925" no communication was received by petitioner from the respondent or anyone in his behalf in respect of petitioner's liability for Federal income taxes for the said year 1925 (except the notice and demand from said Collector for the payment of income taxes and interest for the year 1925, received in June 1926, annexed hereto and marked Ex. 1) until petitioner received the letter dated January 9, 1928, a copy of which is annexed and referred to in the petition filed in the above-entitled cause.

(Signed)

CHAS. S. ELLIOTT,

President.

“

C. A. STERLING,

Secretary.

Subscribed and sworn to before me this 3rd day of February, 1931.

(Signed)
[SEAL.]

STELLA B. HAMILTON,
Notary Public, State of Kansas.

My commission expires June 10, 1933.

18C

Ex. 1.

Notice and Demand for Income Tax.

Form 17A, U. S. Internal Revenue, Revised Jan., 1924.

2-9487.

Old balance.	Date.	Tax.	Amount Paid.	Balance Payable.	Remarks.
Tax due on 1925 income					
tax return				9,288.05	April, 1926, #401206.
1% Interest on Delin-					
quent instalment from					
3/15/26 to 6/1/26.....				55.73	
				9,343.78	
Interest				31.14	
				9,374.92	Paid

Notice is hereby given that there has been assessed against you the amount of tax stated above. Demand is hereby made for the immediate payment of said tax. If payment is not made within ten days after date of this notice, the Act provides that a penalty of 5 per cent of the amount of tax due will be added, plus interest at the rate of 1 per cent per month, until paid.

Capitol Bldg. & Loan Ass'n, 6th & Kansas Avenue, Topeka,
Kansas.

Date: —.

To the Collector of Internal Revenue:

I inclose herewith the sum of \$— in payment of the tax shown above.

Name: — — —,

Address: — — —.

Collector's Paid Stamp: District of Kansas. Paid June 21, 1926. H. H. Motter, Collector.

Receipt: —.

To avoid penalty and interest this tax must be paid within 10 days from the above date to the Collector of Internal Revenue at Wichita, Kansas.

Return this form with remittance.

19 United States Board of Tax Appeals. Filed Feb. 12, 1931.

United States Board of Tax Appeals.

Docket No. 36283.

THE CAPITOL BUILDING AND LOAN ASSOCIATION, Petitioner,
v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Motion to Submit.

Come now the petitioner and the respondent by their respective attorneys of record and move that the above-entitled appeal be submitted upon the stipulation between counsel this day filed herein; and that either party may file with the Board within sixty days from the date this motion may be granted a written brief of argument in respect of the jurisdiction of the Board to hear and determine the matter of the tax liability of the petitioner for the year 1925.

L. L. HAMBY,
Attorney for Petitioner.

C. M. CHAREST,
*General Counsel, Bureau of Internal
Revenue, for the Respondent.*

20 United States Board of Tax Appeals, Washington.

Docket No. 36283.

THE CAPITOL BUILDING AND LOAN ASSOCIATION, Petitioner,
v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Order.

The parties to the above-entitled proceeding having filed a joint motion that said proceeding be submitted upon the

stipulation between counsel, filed February 12, 1931, and that either party may file with the Board within 60 days from the date of this motion a written brief in respect of the jurisdiction of the Board to hear and determine the matter of the tax liability of the petitioner for the year 1925, it is

Ordered: That said motion be and the same is hereby granted and the proceeding assigned to Mr. Trammell, Division No. 2, for decision; and it is further

Ordered: That either party may, on or before April 11, 1931, file a written brief pursuant to said motion.

Dated Washington, D. C., February 17, 1931.

(Signed)

LOGAN MORRIS,

Chairman.

A true copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

21

23 B. T. A., —.

United States Board of Tax Appeals.

Docket No. 36283.

CAPITOL BUILDING & LOAN ASSOCIATION, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Promulgated June 24, 1931.

L. L. Hamby, Esq., for the petitioner.

J. Arthur Adams, Esq., and Frank A. Surine, Esq., for the respondent.

A true copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

Opinion.

TRAMMELL: This proceeding involves deficiencies for 1924 and 1926 in the amount of \$11,630.50 and \$927.70, respec-

tively, and the further question as to whether the Board has jurisdiction for 1925, for which year the respondent has determined an overassessment of \$122.51.

The parties have stipulated that there are no deficiencies for either of the years 1924 and 1926, but that there were overpayments in taxes in the amounts of \$11,630.50 and \$5,729.49 for 1924 and 1926, respectively. With respect, however, to interest paid on the above amounts, the petitioner contends and the respondent denies that the Board has jurisdiction to make a determination. For 1924, the petitioner was assessed interest in the amount of \$2,132.71, of which the petitioner paid \$2,010.30 on June 13, 1928, and the balance, \$122.51, was paid by a credit on the tax liability for 1925. The petitioner was assessed interest on the 1926 taxes in the amount of \$94.94, all of which was paid on or before March 31, 1928, \$36 having been
22 paid on June 15, 1927, and \$58.94 on March 31, 1928.

This interest was added to the tax and collected.

The controversy relates to the question as to whether the Board has jurisdiction to determine whether the amount of interest paid on a conceded overpayment of taxes is an overpayment.

Our jurisdiction to determine overpayments rests upon section 284 (e), which provides as follows:

If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer as provided in subdivision (a). Such refund or credit shall be made either (1) if claim therefor was filed within the period of limitation provided for in subdivision (b) or (g) or (2) if the petition was filed with the Board within four years after the tax was paid, or, in the case of a tax imposed by this Act, within three years after the tax was paid.

It is to be observed that if the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax for the taxable year in which a deficiency was determined, it shall have jurisdiction to

determine the amount of the overpayment. Such overpayment referred to is an overpayment of *tax*. The interest on a tax is not a tax, but is something in addition to the tax. The additions to the tax or additional amounts added to the tax are not the tax which is referred to in the statute which we can find has been overpaid. We have held that

23 a deficiency, notice of which was sent to a taxpayer and which is in part due to an erroneous refund, would not be increased by an amount equal to the interest paid by the Commissioner at the time of making such refund, although motion to do so is timely made. *Joseph Levy et al.*, 18 B. T. A. 337. In the same case we held that interest does not fall within the terms of section 308 (e) of the Revenue Act of 1926, which provides that the Board shall have power to determine whether any additional amount or addition to the tax should be assessed.

We have also held that interest paid to a taxpayer at the time of an erroneous refund is not an amount "otherwise rebated or refunded" and does not fall within the definition of a statutory deficiency. *L. G. Wolfe, Administrator*, 20 B. T. A. 1065.

In our opinion, the interest on the amount asserted as deficiencies which was subsequently determined to have been overpayments is not itself an overpayment of tax, and consequently we have no jurisdiction to determine the matter.

Reviewed by the Board.

Judgment will be entered under Rule 50.

24 23 B. T. A. —.

United States Board of Tax Appeals.

Docket No. 36283.

CAPITOL BUILDING & LOAN ASSOCIATION, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Promulgated July 13, 1931.

A true copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

L. L. Hamby, Esq., for the petitioner.

J. Arthur Adams, Esq., and Frank A. Surine, Esq., for the respondent.

Supplemental Opinion.

TRAMMELL: In the opinion in this proceeding promulgated June 24, 1931 we did not pass upon one of the issues involved in the proceeding, to-wit, whether the Board had jurisdiction for the taxable year 1925.

With respect to that issue the evidence discloses that the petitioner, believing and contending that it was exempt from liability for income taxes, but being required to file a return or face a penalty for failing to do so, filed on March 12, 1926 a paper entitled "Corporation Income Tax Return for Calendar Year 1925" on which was given most of the information called for thereon in respect to items that represent gross income and deductions therefrom but omitting to state any net income subject to the tax, any claim for credit as a taxable corporation, any amount of statutory gross income, any amount as the sum of statutory deductions and omitting to show any amount as
25 a tax. Attached to this paper designated a return was a written protest signed by the petitioner disclaiming any liability for the filing of the return or the payment of taxes but claiming exemption therefrom as a domestic building and loan association. No amount was paid upon the filing of this paper.

From the information contained in the aforesaid paper respondent computed and thereafter without mailing the notice required by section 274 (a) assessed a tax against the petitioner in the amount of \$9,288.05 on May 26, 1926. In June, 1926 interest upon said tax was assessed in the amount of \$86.87 and thereafter upon notice and demand from the Collector the petitioner paid said tax and interest under protest. Thereafter on January 9, 1928 the respondent mailed the petitioner a letter accompanied by a statement upon which was set forth the tax liability of the petitioner for each of the years 1924, 1925 and 1926. The petitioner received no communication whatever from the respondent from the date it filed on March 12, 1926, the aforesaid paper entitled "Return" until it received the letter of January 9, 1928 further than notice and dem-

for payment from the Collector. Within 60 days after the date of the notice of deficiency of January 9, 1928, the petitioner filed its petition with the Board of Tax Appeals.

The Commissioner later credited against the taxes he had assessed for 1924 an overassessment and overpayment of \$122.51 of the taxes for 1925.

26 The petitioner contends that as the Commissioner claims a larger amount due than that shown upon the return and admitted to be due that the Board has jurisdiction to hear and redetermine the entire liability, otherwise it has no jurisdiction.

We may entirely agree with the taxpayer's contention that when it filed its return in which it did not set forth any amount as the tax and accompanied that return with a statement and protest that no tax was due upon the ground that it was an exempt corporation that when the Commissioner asserted any amount as a tax that the amount so asserted was a deficiency, upon the authority of *Continental Accounting and Audit Company*, 2 B. T. A. 761, but conceding this to be true, there is another difficulty in this case. The petitioner has paid all the tax claimed to be due and has not received a notice from the Commissioner asserting any deficiency. Conceding that no amount was shown as a tax by the taxpayer on his return or that no return was made by the taxpayer, then in order to be a deficiency there must be some amount asserted which exceeds the tax previously assessed or collected without assessment. This is not a case where a claim in abatement was rejected and by the rejection thereof the Commissioner in effect asserted an additional tax liability in excess of that previously paid from which the taxpayer is now appealing but is a case where the Commissioner is not asserting any amount in excess of that previously paid before the sending of the notice of the deficiencies which involved the other years only. In the present notice of deficiency the Commissioner merely stated that there had been an overassessment for 1925. Clearly this did not give us jurisdiction to determine the amount of the overassessment.

27 It may well be that the Commissioner acted illegally in collecting the tax for 1925 in that he did not send a notice of deficiency, and it may well be true that the taxpayer could have enjoined the collection of the tax upon that theory, but these are questions with which

we have no concern. In any event, the Commissioner has not mailed to the taxpayer a notice of the deficiency based upon which the taxpayer may appeal to the Board for a redetermination thereof.

The proceeding, so far as 1925 is concerned, will therefore be dismissed for lack of jurisdiction.

Order of dismissal will be entered accordingly.

28 United States Board of Tax Appeals, Washington.

Docket No. 36283.

CAPITOL BUILDING & LOAN ASSOCIATION, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Decision.

Pursuant to the determination of the Board, as set forth in its report promulgated July 13, 1931, it is

Ordered and decided: That the proceeding relating to the year 1925 be, and the same is hereby, dismissed for lack of jurisdiction.

Enter.

(Signed)

CHARLES M. TRAMMELL,

Member.

Entered Jul. 14, 1931.

A true copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

29 United States Board of Tax Appeals, Washington.

Docket No. 36283.

THE CAPITOL BUILDING & LOAN ASSOCIATION, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Decision.

Pursuant to opinion promulgated June 24, 1931 and supplemental opinion promulgated July 13, 1931, the petitioner

on October 6, 1931, having filed a recomputation under Rule 50 showing overpayments for the years 1924 and 1926, in the amounts of \$11,630.50 and \$5,729.49, respectively, and on October 7, 1931 the respondent having filed notice of settlement also showing overpayments for same amounts for said years, it is

Ordered and decided that there are overpayments for the years 1924 and 1926 in the amounts of \$11,630.50 and \$5,729.49, respectively; and that there are no deficiencies for said years.

Enter.

(Signed) | CHARLES M. TRAMMELL,
Member.

vlh.

Entered Oct. 13, 1931.

A true copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

30 Received Dec. 21, 1931. U. S. Board of Tax Appeals.

United States Board of Tax Appeals. Filed Dec. 19, 1931.

United States Board of Tax Appeals.

Docket No. 36283.

CAPITOL BUILDING & LOAN ASSOCIATION, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Stipulation Between Counsel for Review by the Court of Appeals of the District of Columbia.

In accordance with the provisions of section 1002(d) of the Revenue Act of 1926 as amended, it is hereby stipulated and agreed by and between counsel for the petitioner and for the respondent in the above entitled cause that the orders and decisions of the United States Board of Tax Appeals

herein shall be reviewed on appeal to the Court of Appeals of the District of Columbia.

Done at Washington in the District of Columbia this 19th day of December, 1931.

L. L. HAMBY,

Attorney for Petitioner.

C. M. CHAREST,

General Counsel, Bureau of Internal

Revenue, Attorney for Respondent.

31 United States Board of Tax Appeals. Filed Dec. 19, 1931.

United States Board of Tax Appeals.

Docket No. 36283.

CAPITOL BUILDING & LOAN ASSOCIATION, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Petition for Review.

Now comes Capital Building & Loan Association and respectfully represents:

I. Petitioner is a corporation existing under and by virtue of the laws of the State of Kansas, having its office and place of business in Topeka in said State.

II. Respondent, David I. Burnet, is United States Commissioner of Internal Revenue, having succeeded as such Commissioner Robert H. Lucas who in turn succeeded as such Commissioner David H. Blair who was Commissioner of Internal Revenue at the time the assessments hereinafter referred to were made and thenceforth until subsequent to the filing of the petition with the United States Board of Tax Appeals to redetermine the liability of petitioner.

32 III. During the year 1926 the said David H. Blair made certain assessments of income taxes and interest thereon against petitioner for the years 1924, 1925 and 1926 and transmitted them for collection to the United States Collector of Internal Revenue at Wichita, Kansas, within the jurisdiction of the United States Circuit Court of Appeals for the Tenth Circuit. Upon notice from and

on October 6, 1931, having filed a recomputation under Rule 50 showing overpayments for the years 1924 and 1926, in the amounts of \$11,630.50 and \$5,729.49, respectively, and on October 7, 1931 the respondent having filed notice of settlement also showing overpayments for same amounts for said years, it is

Ordered and decided that there are overpayments for the years 1924 and 1926 in the amounts of \$11,630.50 and \$5,729.49, respectively; and that there are no deficiencies for said years.

Enter.

(Signed) CHARLES M. TRAMMELL,
Member.

vlh.

Entered Oct. 13, 1931.

A true copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

30 Received Dec. 21, 1931. U. S. Board of Tax Appeals.

United States Board of Tax Appeals. Filed Dec. 19, 1931.

United States Board of Tax Appeals.

Docket No. 36283.

CAPITOL BUILDING & LOAN ASSOCIATION, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Stipulation Between Counsel for Review by the Court of Appeals of the District of Columbia.

In accordance with the provisions of section 1002(d) of the Revenue Act of 1926 as amended, it is hereby stipulated and agreed by and between counsel for the petitioner and for the respondent in the above entitled cause that the orders and decisions of the United States Board of Tax Appeals

herein shall be reviewed on appeal to the Court of Appeals of the District of Columbia.

Done at Washington in the District of Columbia this 19th day of December, 1931.

L. L. HAMBY,

Attorney for Petitioner.

C. M. CHAREST,

General Counsel, Bureau of Internal

Revenue, Attorney for Respondent.

31 United States Board of Tax Appeals. Filed Dec. 19, 1931.

United States Board of Tax Appeals.

Docket No. 36283.

CAPITOL BUILDING & LOAN ASSOCIATION, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Petition for Review.

Now comes Capital Building & Loan Association and respectfully represents:

I. Petitioner is a corporation existing under and by virtue of the laws of the State of Kansas, having its office and place of business in Topeka in said State.

II. Respondent, David I. Burnet, is United States Commissioner of Internal Revenue, having succeeded as such Commissioner Robert H. Lucas who in turn succeeded as such Commissioner David H. Blair who was Commissioner of Internal Revenue at the time the assessments hereinafter referred to were made and thenceforth until subsequent to the filing of the petition with the United States Board of Tax Appeals to redetermine the liability of petitioner.

32 III. During the year 1926 the said David H. Blair made certain assessments of income taxes and interest thereon against petitioner for the years 1924, 1925 and 1926 and transmitted them for collection to the United States Collector of Internal Revenue at Wichita, Kansas, within the jurisdiction of the United States Circuit Court of Appeals for the Tenth Circuit. Upon notice from and

demand by the said Collector petitioner paid the taxes and interest under protest.

IV. Petitioner and respondent, by their respective counsel, have stipulated, agreed and consented, as they may lawfully do, that the petition for review herein of the decision of the said Board of Tax Appeals shall be filed and heard in the Court of Appeals of the District of Columbia.

V. The nature of the controversy is entirely jurisdictional, two distinct questions being involved, namely, (1) whether the Board of Tax Appeals has jurisdiction to determine the liability of petitioner for the year 1925; and (2) whether the Board has jurisdiction to determine that the amount of interest paid on a conceded overpayment of taxes is an overpayment.

Petitioner's Assignments of Error.

1. The Board of Tax Appeals erred in holding and concluding that it did not have jurisdiction to determine the amount of the liability of petitioner for income taxes for the year 1925.

33 2. The Board of Tax Appeals erred in holding and concluding that it did not have jurisdiction to determine whether the amount of interest paid by petitioner upon an admitted overpayment of income taxes, is an overpayment within the purport, intention and meaning of the Revenue Act of 1926 as amended by the Revenue Act of 1928.

3. The Board of Tax Appeals erred in failing to enter an order finding petitioner had made an overpayment of interest on income taxes paid for the years 1924 and 1926.

L. L. HAMBY,
Attorney for Petitioner,
Transportation Building,
Washington, D. C.

34 United States Board of Tax Appeals. Filed Dec. 19, 1931.

United States Board of Tax Appeals.

Docket No. 36283.

CAPITOL BUILDING & LOAN ASSOCIATION, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Præcipe for Transcript.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and within sixty days from the date of filing of the petition for review in the above entitled case transmit to the Clerk of the Court of Appeals of the District of Columbia certified copy of the following records and documents:

1. The docket entries of all proceedings before the Board of Tax Appeals in the above entitled appeal which shall include the filing of this præcipe.

2. The petition of the taxpayer filed March 8, 1928.

3. The answer of the respondent filed May 22, 1928.

4. The stipulation of facts filed February 12, 1931.

5. The motion to submit upon stipulation between counsel filed February 12, 1931.

6. The stipulation between counsel to admit certain statements and affidavits as evidence, filed February 12, 1931; together with the statements and affidavits thereunto attached.

35 7. The order of the Board filed February 17, 1931, granting the motion to submit filed February 12, 1931.

8. Opinion of the Board by Mr. Trammell, Division 2, filed June 24, 1931.

9. The supplementary opinion of the Board by Mr. Trammell, Division 2, filed July 13, 1931.

10. The decision of the Board entered July 14, 1931, as to the year 1925.

11. The decision of the Board by Mr. Trammell, Division 2, entered October 13, 1931.

12. This præcipe.

L. L. HAMBY,
Attorney for Petitioner,
Transportation Building,
Washington, D. C.

36 Docket No. 36283.

THE CAPITOL BUILDING & LOAN ASSN., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Certificate.

I, B. D. Gamble, Clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages 1 to 35, inclusive, contain and are a true copy of the transcript of record, papers and proceedings on file and of record in my office as called for by the Præcipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 7th day of January, A. D. 1932.

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk.

Endorsed on cover: Board of Tax Appeals. No. 5613. The Capitol Building & Loan Assn., appellant, vs. David Burnet, Commissioner of Internal Revenue. Court of Appeals, District of Columbia. Filed Feb. 17, 1932. Henry W. Hodges, Clerk.

FOR MR. JUSTICE ECK

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

OCT 14 1932

Henry H. Woodcock

CLERK

Court of Appeals, District of Columbia.

JANUARY TERM, 1932.

No. 5613

THE CAPITOL BUILDING & LOAN ASSN.,
APPELLANT,

vs.

DAVID BURNET, COMMISSIONER OF INTERNAL
REVENUE.

APPEAL FROM THE BOARD OF TAX APPEALS.

BRIEF FOR APPELLANT.

L. L. HAMBY,
Attorney for Appellant.

Court of Appeals, District of Columbia.

JANUARY TERM, 1932.

No. 5613

THE CAPITOL BUILDING & LOAN ASSN.,
APPELLANT,

vs.

DAVID BURNET, COMMISSIONER OF INTERNAL
REVENUE.

APPEAL FROM THE BOARD OF TAX APPEALS.

BRIEF FOR APPELLANT.

Statement of the Case.

The sole question involved in this appeal is whether the Board of Tax Appeals has jurisdiction to hear and determine the income-tax liability of appellant for the year 1925.

The facts, stipulated by the parties, were very fully set forth in the supplementary opinion of the Board (R. 21). They are as follows:

Appellant, believing and contending that it was exempt from liability for income taxes, but being required to file a return or face a penalty for failing to do so, filed on March 12, 1926, a paper entitled "Corporation Income Tax Return for Calendar Year 1925," on which was given most of the information called for thereon in respect to items that represent gross income and deductions therefrom, but omitting to state any net income subject to the tax, any claim for credit as a taxable corporation, any amount as statutory gross income, any amount as the sum of statutory deductions, and omitting to show any amount as the tax. Attached to the return was a written protest signed by appellant disclaiming any liability for the filing of a return or for payment of taxes, but claiming exemption therefrom as a domestic building and loan association. No amount was paid upon filing of the return.

From the information contained in the return appellee computed and thereafter, without mailing the notice required by section 274(a), assessed a tax against appellant in the amount of \$9,288.05 on May 26, 1926. In June, 1926, interest upon the said tax was assessed in the amount of \$86.87 and thereafter upon notice and demand from the Collector, appellant paid said tax and interest under protest. Thereafter, on January 9, 1928, appellee mailed the appellant a letter, accompanied by a statement, upon which was set forth

the tax liability of appellant for each of the years 1924, 1925 and 1926. Appellant received no communication whatever from the appellee from the day it filed, on March 12, 1926, the aforesaid return until it received the letter of January 9, 1928, except the notice and demand for payment from the Collector. Within sixty days after the date of the notice of deficiency of January 9, 1928, appellant filed its petition with the Board of Tax Appeals.

The appellee later credited against the taxes he had assessed for the year 1924 an overassessment and overpayment of \$122.51 of the taxes for 1925.

Appellant contends that as no amount was shown as the tax by it upon its return, having asserted its right to exemption, the assessment made by the appellee in the amount of \$9,288.05, followed by the letter of January 9, 1928, notifying appellant of its tax liability as determined by the appellee constituted notice of a deficiency which the Board of Tax Appeals has the right to redetermine.

Assignment of Error.

In the petition for review by this Court three errors were assigned (R. 26). The second and third errors therein assigned, relating to the jurisdiction of the Board to find an overpayment of interest and its failure to enter an order to that effect, appellant now withdraws and will not urge either of them because the appellee has since settled with appellant by refunding the interest involved. Therefore only the first assignment of error will here be urged, namely:

•

(1) The Board of Tax Appeals erred in holding and concluding that it did not have jurisdiction to determine the amount of the liability of appellant for income taxes for the year 1925.

Statutes Involved.

The pertinent parts of the statute upon which appellant relies are:

REVENUE ACT OF 1926.

“SEC. 273. As used in this title in respect of a tax imposed by this title the term ‘deficiency’ means:

(1) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

(2) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.”

“SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a

deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day) the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes, the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court."

"SEC. 279. (a) If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

(b) If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under subdivision (a) of section 274, then the Commissioner shall mail a notice under such

subdivision within 60 days after the making of the assessment.

(c) The jeopardy assessment may be made in respect of a deficiency greater or less than that notice of which has been mailed to the taxpayer, despite the provisions of subdivision (f) of section 274 and whether or not the taxpayer has theretofore filed a petition with the Board of Tax Appeals. The Commissioner shall notify the Board of the amount of such assessment, if the petition is filed with the Board before the making of the assessment or is subsequently filed, and the Board shall have jurisdiction to redetermine the entire amount of the deficiency and of *all amounts assessed at the same time in connection therewith.*”

* * * * *

(k) No claim in abatement shall be filed in respect of any assessment made after the enactment of this Act in respect of any income, war-profits, or excess-profits tax.”

“SEC. 284. (e) If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer as provided in subdivision (a). Such refund or credit shall be made either (1) if claim therefor was filed within the period of limitation provided for in subdivision (b) or (g), or (2) if the

petition was filed with the Board within four years after the tax was paid, or, in the case of a tax imposed by this Act, within three years after the tax was paid.”

Opinion of the Board of Tax Appeals.

The supplementary opinion of the Board (R. 21) deals with the question we are now presenting, the Board having omitted to pass upon it in its original opinion (R. 18) which dealt with an issue which has been withdrawn.

After stating the salient facts and the contention of appellant the Board said it might entirely agree with appellant's contention but for the fact that appellant had paid the tax and has not received notice from the Commissioner asserting any deficiency. It further stated that conceding no amount was shown as the tax by the taxpayer on its return, still in order to be a deficiency there must be some amount asserted by the Commissioner which exceeded the tax “*previously assessed or collected without assessment.*”

ARGUMENT.

The principal error made by the Board of Tax Appeals lies in interpreting the language of the statute. Specifically, the Board stated in the middle of page 22 of the record:

“Conceding that no amount was shown as a tax by the taxpayer on his return or that no return was made by the taxpayer, then in order to be a deficiency there must be some amount

asserted which exceeds the tax *previously assessed or collected without assessment.*" (Italics supplied.)

The Board does not state the source of the language it used but it is found to be a deleted statement of what is contained in paragraph (2) of section 273 of the 1926 Act (*supra*), three words of importance being omitted. Paragraph (2) of section 273 provides:

"SEC. 273. As used in this title in respect of a tax imposed by this title the term 'deficiency' means—

* * * * *

(2) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) *as a deficiency*; * * *

There was no amount previously assessed (or collected without assessment) against appellant *as a deficiency*, and it must follow, therefore, that the total amount asserted by the Commissioner in his letter of January 9, 1928, as appellant's liability for 1925 was a deficiency in taxes because no amount was shown as the tax upon the return and no tax had been assessed or collected previously as deficiency.

Section 274(a) (*supra*) provides that if the Commissioner determine a deficiency in respect of the tax he is authorized to send a notice thereof to the taxpayer by registered mail and within sixty days thereafter the

taxpayer may appeal to the Board. Now comes the important part of this section which prohibits, except as provided in sub-divisions (*d*) or (*f*) thereof or in sections 279, 282 or 1001, any assessment of a *deficiency* in taxes or distraint or proceeding in court for its collection until the Commissioner has sent the taxpayer a sixty day notice in writing by registered mail apprizing him of his tax liability as the Commissioner has determined it to be. The facts show and the Board concedes that the Commissioner made the assessment without having first sent any notice of deficiency and that the first notice that appellant received advising it of its tax liability as determined by the Commissioner was the letter of January 9, 1928, within sixty days after which the appellant filed its petition with the Board (R. 21). Let us now look at the exceptions to see whether there was an assessment or collection previously made as a deficiency.

Sub-divisions (*d*) and (*f*) of section 274 relate to waivers and mathematical matters and are not applicable. Section 282 relates to bankruptcy proceedings and is not applicable. Section 1001 relates to assessments made pending appeal from the decision of the Board to a Circuit Court of Appeals and is not applicable.

The only remaining section coming within the exceptions is section 279 (*supra*) which authorizes the Commissioner to make an assessment without first giving the sixty days notice if he thinks collection of the tax may be jeopardized by delay. It is left entirely to the discretion of the Commissioner whether he shall make

such an assessment and he is not required to give the taxpayer any notice that he considers collection of the tax to be in jeopardy. We must presume, therefore, that the assessment which the Commissioner made in May 1926 was such an assessment; otherwise his action would be wholly without authority. It is a presumption of law that a public officer in the commission of an act, acted within his authority, especially if there be any provision of law which authorized him so to act. Now, while section 279 authorized the Commissioner to make such an assessment as he made without first giving the sixty day notice it also provided in subdivision (b) thereof that if the Commissioner make such an assessment without first giving the sixty day notice he shall thereafter send such a notice upon which the taxpayer shall have the same right of appeal to the Board as though the notice were sent before the assessment. When, and only when, such a notice is sent as required by section 279, can it be said that there has been an assessment *as a deficiency*. No such notice was sent until January 9, 1928, and within sixty days thereafter appellant filed its appeal with the Board. Obviously, if the Board's decision be correct, the Commissioner could prevent every exempt corporation from appealing to the Board of Tax Appeals. If they attempted to assert the right of exemption that the law gives them the Commissioner, instead of notifying them that they are not exempt but subject to the tax and informing them in a sixty day notice of the amount of the tax and giving them the right to appeal to the Board, could simply make an assessment and at his pleasure notify the tax-

payer that his liability is the amount which was previously assessed and that there is therefore no deficiency, leaving him without recourse to the Board. We would have the same result if a corporation claiming to be exempt under the law were compelled to file a return which, instead of disclaiming any liability for taxes and showing no tax due, should set forth on the return an amount as its *taxable* net income and the amount of the tax thereon. In that case there would be applied subparagraph (1) of section 273, which defines deficiency to mean the amount by which the tax asserted by the Commissioner exceeds the amount shown as the tax by the taxpayer upon his return. It is plain that should such a return show the correct amount of the tax there would be no such deficiency and the exempt corporation could not take the matter before the Board to contest its liability. In short, it can only protect itself in the manner adopted by the appellant here, which filed a return giving the Commissioner all the information which he called for but omitting to claim any credit as a *taxable* corporation or to set forth any *taxable* net income or any amount as *the tax* due and attaching to the face of the return a written protest disclaiming any liability for the payment of taxes upon the ground that it was a domestic building and loan association which is exempt from the payment of such taxes.

The fact that the tax was paid after the assessment was made has nothing to do with the case for subparagraph (i) of section 279 provides:

“SEC. 279. * * *

(i) * * * If the amount already collected exceeds the amount determined as the amount

which should have been assessed, such excess shall be credited or refunded to the taxpayer as provided in section 284. If the amount determined as the amount which should have been assessed is greater than the amount actually assessed, then the difference shall be assessed and shall be collected as part of the tax upon notice and demand from the collector.”

We invite attention also to subdivision (e) of section 284 (*supra*), which provides that if after *the payment* of the tax a *petition is filed* with the Board of Tax Appeals within the time that a claim for refund could be filed, the filing of such petition with the Board shall take the place of and constitute the equivalent of a claim for refund. The petition herein was filed long before the expiration of the time required by law for filing a claim for refund.

With deference to the Board of Tax Appeals, it seems that its interpretation is a strained and unnatural one by which it seeks to deprive itself of jurisdiction rather than sustain its jurisdiction; and the conclusions which it has reached are most repugnant to the obvious spirit, purpose and intent of the act whose purpose was to give all taxpayers the right to have the Board pass upon their liability for taxes if the Commissioner asserted a greater amount than they believed to be due.

The Board has endeavored to distinguish the underlying principle of its own decision in the case of the *Appeal of the Continental Accounting and Audit Co.*, 2 B. T. A. 761, from the principle involved here but the distinction can only be made by faulty interpreta-

tion such as we have already discussed consisting of the failure of the Board to have noticed that the tax previously assessed or collected must have been assessed or collected as a deficiency as that term is defined in the Act. The case cited by the Board involves the same principle as that here involved. Prior to the enactment of the 1924 Act, which created the Board of Tax Appeals, a taxpayer had the right to file a claim for abatement of the whole or any part of the tax assessed by the Commissioner and such assessment did not become final until the Commissioner acted upon the abatement claim. In the case cited an assessment was made against the taxpayer before the enactment of that act. Subsequent to its enactment the Commissioner rejected the claim for abatement. Upon its rejection the taxpayer appealed to the Board of Tax Appeals which held and has ever since held that until the claim was rejected there had been no *final* assessment of the tax and that since the 1924 and subsequent Acts contemplated that no tax shall be *finally* assessed without first giving notice to the taxpayer and affording him a right to appeal to the Board, the rejection of the claim in abatement constituted a determination of a deficiency in taxes to the full extent of the amount of the rejection and gave the taxpayer the right to have the Board determine its liability. We have the same thing here only our case comes directly under the provisions of the act itself. Here the Commissioner made an assessment which the statute says shall not be a final one and shall not deprive the taxpayer of review by the Board of Tax Appeals unless he fails to file a

petition with the Board within sixty days after the Commissioner has notified him of the liability determined by sending him a notice in writing by registered mail. Appellant, as the Board has found in its statement of the facts, filed a petition to the Board within sixty days after it received notice by registered mail from the Commissioner asserting its determined liability of the petitioner for the year 1925 as well as for the two other years. The Board also found that until that letter was sent the Commissioner had never sent any communication whatever to appellant subsequent to the assessment of the tax. Now the Board says that the principle of the Continental Audit case can not be applied here because in that case the tax was not paid although it was assessed, whereas they say in our case the tax was paid, and since the amount did not *exceed* that which the Commissioner says is the liability of appellant there was no deficiency. The Board fails to point out what payment of the assessment has to do with it. We have already shown by subparagraph (e) of section 284 that the Board has jurisdiction to determine an overpayment of taxes which contemplates that the taxpayer has the right to make payment of a tax whether it is actually assessed or merely asserted as a deficiency. There is no reason why the taxpayer should not be permitted to pay any tax assessed or even asserted and avoid the accrual of interest against him should it ultimately develop that the assessment or the deficiency asserted was either wholly or partly correct, especially, if by paying it he may not only recover it but obtain interest upon any part overpaid.

Finally, we wish to point out in the Board's statement that by the letter of January 9, 1928, the Commissioner specifically asserted what he called a deficiency for the year 1924 and the year 1926 but did not assert a deficiency for the year 1925. The Board has overlooked the fact that it was the sending of that letter of January 9 wherein the Commissioner for the first time after the assessment determined the liability of appellant for 1925 and notified him thereof. Since the law required in every case where an assessment is made without first sending a sixty day notice, that a notice shall be sent after the assessment by the Commissioner to the taxpayer notifying him of his liability and giving him the right to appeal to the Board of Tax Appeals within sixty days after the date of such notice, it is plain that the letter of January 9, 1928, which is the only one ever sent to appellant, constituted, itself, the notice required by section 279 and was under that section a notice of deficiency to the full amount asserted because the appellant disclaimed any liability for taxes upon the filing of its return and failed to admit or show any amount thereon as the tax.

In passing it is interesting to note that the Board has failed to observe that in the Continental Audit case the Commissioner did not in his letter rejecting the abatement claim inform or notify the taxpayer that he was asserting any deficiency. On the contrary, the Commissioner denied that he was asserting any deficiency at all and claimed that he was merely re-affirming the tax which he had previously assessed. If the Board's reasoning in the Continental Audit case was

right its reasoning here is wrong. Whether the Board was right or wrong in that case appellant is fully protected here by the provisions of the 1926 Act with which the Commissioner did not comply until he wrote the letter of January 9, 1928. In writing that letter he was only required, under section 279(b), to notify the taxpayer of the amount of its liability determined for the year 1925 following the assessment made under section 279. In the letter of January 9 the Commissioner did notify appellant of the amount of liability determined for that year and the amount which he had previously assessed. Whether he called it a deficiency or not the law says it is a deficiency if the taxpayer filed no return or showed no amount to be the tax on his return.

Respectfully submitted,

L. L. HAMBY,
Attorney for Appellant.

NOV 3 0 1932

No. 5613

Kenneth W. Rodgers

CLERK

**In the Court of Appeals of the District of
Columbia**

JANUARY TERM, 1932

THE CAPITOL BUILDING & LOAN ASSN., APPELLANT

v.

**DAVID BURNET, COMMISSIONER OF INTERNAL REVE-
NUE, APPELLEE**

APPEAL FROM THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR APPELLEE

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JANUARY TERM, 1932

No. 5613

THE CAPITOL BUILDING & LOAN ASSN., APPELLANT

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE,
appellee

APPEAL FROM THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR APPELLEE

PREVIOUS OPINION

The only previous opinion is that of the United States Board of Tax Appeals (R. 21), which is reported in 23 B. T. A. 1116.

JURISDICTION

The appeal is taken from a decision (order of redetermination) of the Board of Tax Appeals entered July 14, 1931. (R. 23-24.) The case is brought to this court by a petition for review filed December 19, 1931 (R. 25), pursuant to the provisions of Sections 1001, 1002, and 1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 109, 110.

QUESTION PRESENTED

Whether the Board erred in refusing to determine the tax liability of appellant for the year 1925 and/or in dismissing the petition for review for that year for lack of jurisdiction.

STATUTES INVOLVED

The statutes involved will be found in the Appendix, *infra*, pp. 15-21.

STATEMENT

The findings of the Board of Tax Appeals, which are set out in its opinion, are substantially as follows (R. 21-22):

Appellant, believing and contending that it was exempt from liability for income taxes, but being required to file a return or face a penalty for failing to do so, filed on March 12, 1926, a paper entitled "Corporation Income Tax Return for Calendar Year 1925," on which was given most of the information called for thereon in respect to items that represent gross income and deductions therefrom but omitting to state any net income subject to the tax, any claim for credit as a taxable corporation, any amount of statutory gross income, any amount as the sum of statutory deductions, and omitting to show any amount as a tax. Attached to this paper designated a return was a written protest signed by the appellant disclaiming any liability for the filing of the return or the payment of taxes, but claiming exemption therefrom as a do-

mestic building and loan association. No amount was paid upon the filing of this paper.

From the information contained in the aforesaid paper appellee computed and thereafter, without mailing the notice required by Section 274 (a), assessed a tax against the appellant in the amount of \$9,288.05 on May 26, 1926. In June, 1926, interest upon said tax was assessed in the amount of \$86.87 and thereafter upon notice and demand from the Collector the appellant paid said tax and interest under protest. Thereafter, on January 9, 1928, the appellee mailed the appellant a letter accompanied by a statement upon which was set forth the tax liability of the appellant for each of the years 1924, 1925, and 1926. The appellant received no communication whatever from the appellee from the date it filed on March 12, 1926, the aforesaid paper entitled "Return" until it received the letter of January 9, 1928, further than notice and demand for payment from the Collector. Within 60 days after the date of the notice of deficiency of January 9, 1928, the appellant filed its petition with the Board of Tax Appeals.

The Commissioner later credited against the taxes he had assessed for 1924 an overassessment and overpayment of \$122.51 of the taxes for 1925.

The first paragraph of the letter dated January 9, 1928, referred to in the Board's findings of fact reads as follows (R. 5):

The determination of your tax liability for the years 1924, 1925, and 1926 discloses

a deficiency of \$12,558.20 for the years 1924 and 1926 and an overassessment of \$122.51 for the year 1925, as shown by the attached statement.

The first and second paragraphs of page 4 of the statement attached to said letter read as follows (R. 9):

The overassessment shown herein will be made the subject of a Certificate of Overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district and will be applied by that official in accordance with Section 284 of the Revenue Act of 1926.

The right of petition as indicated on Page 1 of this letter refers only to any deficiency in tax indicated herein inasmuch as there is no provision in the Revenue Act of 1926 granting the right of petition against the determination of any overassessment found upon a review of your returns.

The appellant has not at any time filed any claim for abatement or refund of any Federal income tax or interest assessed or paid for the year 1925. (R. 13.)

The Board of Tax Appeals held that the appellant had paid all the tax claimed to be due for 1925 and had not received a notice from the Commissioner asserting any deficiency, and that the notice of deficiency relied upon showed an overassessment and not a deficiency. Therefore it dismissed the petition for review in so far as it related to the year 1925.

ARGUMENT

The deficiency notice of January 9, 1928, on which the taxpayer based his appeal to the board, notified him of deficiencies for other years and of an overassessment for the taxable year 1925; there has been no determination of a deficiency by the commissioner from which the taxpayer was entitled to appeal or if there has been, the taxpayer did not appeal from it within the time prescribed by law; hence the board had no jurisdiction to determine the amount of an overpayment for that year

The Board of Tax Appeals is an administrative tribunal of limited jurisdiction. *Williamsport Wire Rope Co. v. United States*, 277 U. S. 551. Hence, it has jurisdiction only where the conditions of the statute conferring jurisdiction upon it are met. There is no presumption that the Board has jurisdiction in any case. *Southern California Loan Association*, 4 B. T. A. 223; *William C. Shanley, Jr.*, 7 B. T. A. 521, affirmed (C. C. A. 5th), 28 F. (2d) 1018.

The Board was created under the Revenue Act of 1924 to review determinations of deficiencies by the Commissioner of Internal Revenue and to afford administrative relief from such determinations before assessment and collection of the additional taxes proposed. *Old Colony Trust Co. v. Commissioner*, 279 U. S. 716.

The Revenue Act of 1926 made certain changes in the organization and powers of the Board (see *Old Colony Trust Co. v. Commissioner*, *supra*) but did not bring about any change in its fundamental purpose.

On the contrary, this statute, even more clearly than the Revenue Act of 1924, limited the Board's jurisdiction to cases where the Commissioner had determined a deficiency.

Section 274 (a) of the Revenue Act of 1926 provides:

If in the case of any taxpayer the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day) the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. * * *

Thus under this provision the taxpayer's petition to the Board must be a petition "for a redetermination of the deficiency" proposed by the Commissioner.

Section 274 (b) provides for the assessment and collection of the amount "redetermined as the deficiency by the decision of the Board." Subdivision (e) of Section 274 provides that the Board "shall have jurisdiction to redetermine the correct amount of the deficiency," even if greater than that proposed by the Commissioner, provided a claim therefor is asserted by the Commissioner at or before the hearing or a rehearing. Moreover, subdivision (g) expressly states that in determining a deficiency for any taxable year the Board may consider such facts with relation to other taxable years

as may be necessary for that determination, but that the Board "shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid."¹

The term "deficiency" is defined in Section 273 and will be considered more particularly hereinafter. At this point we wish to emphasize that under express provisions of the Revenue Act of 1926 the jurisdiction of the Board arises only where there has been a determination of a deficiency by the Commissioner and the taxpayer files a petition to the Board from the Commissioner's determination. The statute is not susceptible of any other construction, and the courts have so construed it. *Jackson Iron & Steel Co. v. Commissioner*, 54 F. (2d) 861 (C. C. A. 6th), certiorari denied, 286 U. S. 549; *Peerless Woolen Mills v. Rose*, 28 F. (2d) 661 (C. C. A. 5th); *Uncasville Mfg. Co. v. Commissioner*, 55 F. (2d) 893 (C. C. A. 2d). See also *Levy v. Commissioner*, 48 F. (2d) 725 (C. C. A. 9th). The Board has consistently so held. *Columbia State Savings Bank*, 15 B. T. A. 219; *Cornelius Cotton Mills*, 4 B. T. A. 255; *Theodore Stanfield*, 8 B. T. A. 787; *Magdalena W. DeSabichi*, 4

¹ Because of this provision in the Revenue Act of 1926, which was not in the Revenue Act of 1924, the Board has considered that under it its jurisdiction is more clearly restricted to a determination of the correctness of the deficiency asserted by the Commissioner for the particular year and that it does not extend to other years for which over-assessments were found even though all the years were audited at the same time. *Cornelius Cotton Mills*, 4 B. T. A. 255.

B. T. A. 445; *Frank C. Hughson*, 10 B. T. A. 242; *W. H. Morefield*, 4 B. T. A. 394.

Nor does Section 284 (e) constitute an exception to the rule that before the Board can take jurisdiction there must be a deficiency determined by the Commissioner. This section provides in part as follows:

If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer as provided in subdivision (a). * * *

Thus under Section 284 (e) the Board has jurisdiction to determine that instead of there being a deficiency as determined by the Commissioner there is in fact an overpayment and to determine the amount of the overpayment. But Section 284 (e) gives the Board no jurisdiction to determine whether an overassessment or overpayment found by the Commissioner is correct.² *H. Stanley Bent*,

²A possible exception may exist where the overassessment results from the rejection of an abatement claim. See *Uncasville Mfg. Co. v. Commissioner*, *supra*; *John Wanamaker, Philadelphia*, 22 B. T. A. 487, now pending before the Circuit Court of Appeals for the Third Circuit. But it is unnecessary to consider that question, for no abatement claim was filed in this case.

19 B. T. A. 181, affirmed 56 F. (2d) 99 (C. C. A. 9th). In other words, the Board's jurisdiction arises only as the result of a deficiency asserted by the Commissioner, but having attached by reason of the existence of a deficiency determined by the Commissioner extends to its determination of an overpayment instead of a deficiency.

The notice of deficiency dated January 9, 1928, from which the taxpayer appealed in this case, notified the taxpayer that there were deficiencies for the years 1924 and 1926 and an overassessment of \$122.51 for 1925. (R. 5.) It advised the taxpayer of certain adjustments made in the return for 1925, stated that on the basis of those adjustments the correct tax due was \$9,165.54, or \$122.51 less than the amount previously assessed, \$9,288.05. (R. 7-8.) It was stated that this overassessment would be made the subject of a certificate of overassessment and would be applied by the collector in accordance with Section 284 of the Revenue Act of 1926; that is, it would be credited or refunded according to the status of the taxpayer's accounts. (R. 9.) (It was subsequently found to represent an overpayment and credited against taxes due for 1924.) (R. 22.)

Thus the deficiency letter indicated an overassessment and not a deficiency for 1925. Moreover, the taxpayer was warned that the right of petition extended only to the years for which deficiencies were found, as there was no provision in the Revenue Act of 1926 granting the right of peti-

tion against the determination of any overassessment found upon a review of the returns by the Commissioner. (R. 9.)

Notwithstanding this direct statement of the Commissioner that he had found no deficiency for 1925, the taxpayer filed an appeal for 1925 as well as for 1924 and 1926, alleging that the Commissioner had asserted a deficiency of \$9,165.54 for 1925 and that there was no tax due for that year.

From what has been said we think it clear that the Commissioner's letter of January 9, 1928, does not disclose the determination of a deficiency of \$9,165.54. From that purpose it is scarcely necessary to consider the statutory definition of the word "deficiency," but an examination of the definition does not aid the appellant's case.

The term "deficiency" is defined in Section 273 as follows:

(1) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

(2) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assess-

ment) as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.

In this case the tax found due in the so-called deficiency letter was \$9,165.54. Under Section 273 there is no deficiency, for the reason that that amount exceeds the tax originally assessed and paid, \$9,288.05. See *William C. Shanley, Jr.*, 7 B. T. A. 521, affirmed, 28 F. (2d) 1018 (C. C. A. 5th); *Uncasville Mfg. Co. v. Commissioner*, *supra*; *Veeder v. Commissioner*, 36 F. (2d) 342 (C. C. A. 7th).

The taxpayer argues that no amount was shown as the tax upon the return and hence that the entire amount of the tax asserted in the letter of January 9, 1928, was a deficiency within the meaning of Section 273 (2).

This argument is based on decisions of the Board in which it has been held that where a taxpayer files a return under protest claiming that he is not subject to any tax for the reason that he is exempt under the law, the tax subsequently asserted by the Commissioner may be regarded as a deficiency. *Continental Accounting & Audit Co.*, 2 B. T. A. 761; *John Moir*, 3 B. T. A. 21; *Edward J. Lehmann*, 21 B. T. A. 664. Cf. *Jackson Iron & Steel Co. v. Commissioner*, *supra*.

The Board conceded that if in the letter of January 9, 1928, the Commissioner had been claiming

that the taxpayer should pay the tax of \$9,288.05 disclosed by the return, it might be held that the Commissioner was asserting a deficiency under the decisions of the Board in the cases just cited. But the letter of January 9, 1928, was not of that nature. The tax disclosed by the return had been assessed in May, 1926, and paid in June, 1926, and the letter of January 9, 1928, was written to advise the taxpayer of an overassessment.

We submit that if on the basis of the decision in the *Continental Accounting & Audit Co. case* there was a determination of a deficiency in this case at any time it occurred in 1926, when the Commissioner assessed the tax and made demand for the payment of the tax. If that assessment represented a valid assessment of the deficiency, then there was no deficiency asserted January 9, 1928, within the meaning of Section 273 (2), for the correct tax found due at that time was not greater than the amount previously assessed as a deficiency.

On the other hand, if the assessment of May, 1926, was not a valid assessment, the amount of \$9,288.05 collected in June, 1926, represented an amount collected as a deficiency without assessment within the meaning of Section 273 (2), and as the correct tax found due in January, 1928, was less and not more than \$9,288.05, there was no deficiency.

It may be argued that both the assessment and the collection in 1926 were illegal. That may be true, but if so the remedy of the taxpayer is not

by way of an appeal to the Board two years after the assessment was made.

If the taxpayer's theory is correct that there was an assertion of the deficiency, it was made in May, 1926, upon notice and demand, and the taxpayer should have invoked the jurisdiction of the Board within sixty days after the notice of the deficiency as required by Section 274 (a). It might at the same time have sought to enjoin the collection of the tax during the pendency of the proceeding before the Board as is permitted under Section 274 (a), *supra*, or if that procedure would not have been permissible under the theory that the assessment was a jeopardy assessment it might have filed a bond or paid the tax after taking an appeal without depriving the Board of jurisdiction. *Walter S. Hughes*, 10 B. T. A. 1159. The taxpayer clearly had the right to file a claim for refund and if it did not secured redress to institute a proceeding in the district court. It did none of those things.

Whatever it might have done in 1926, the taxpayer can not now invoke the jurisdiction of the Board in order to secure a determination of an overpayment of the total tax paid when there has been no assertion of a deficiency, or if there was one, it occurred several years prior to the filing of the petition. See *Clois L. Greene*, 2 B. T. A. 148; *Percy N. Powers*, 20 B. T. A. 753. Nor can it now invoke the jurisdiction of the Board to find out whether the assessment and collection of the tax in

1926 were illegal in that the Commissioner failed to follow the prescribed procedure. *Clois L. Greene, supra.*

CONCLUSION

The Board of Tax Appeals properly dismissed the appeal relating to the year 1925 for lack of jurisdiction, and its decision should be affirmed.

Respectfully submitted.

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NOVEMBER, 1932.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 273. As used in this title in respect of a tax imposed by this title the term "deficiency" means—

(1) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

(2) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.

SEC. 274. (a) If in the case of any taxpayer the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the

taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes, the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(b) If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

* * * * *

(e) The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount, or addition to the tax should be assessed, if claim therefor

is asserted by the Commissioner at or before the hearing or a rehearing.

* * * * *

(g) The Board in redetermining a deficiency in respect of any taxable year shall consider such facts with relation to the taxes for other taxable years as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid.

SEC. 279. (a) If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law), and notice and demand shall be made by the collector for the payment thereof.

(b) If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under subdivision (a) of section 274, then the Commissioner shall mail a notice under such subdivision within 60 days after the making of the assessment.

(c) The jeopardy assessment may be made in respect of a deficiency greater or less than that notice of which has been mailed to the taxpayer, despite the provisions of subdivision (f) or section 274 and whether or not the taxpayer has theretofore filed a petition with the Board of Tax Appeals. The Commissioner shall notify the Board of the amount of such assessment, if the petition is filed with the Board before the making of the assessment or is subsequently filed, and the Board shall have juris-

diction to redetermine the entire amount of the deficiency and of all amounts assessed at the same time in connection therewith.

SEC. 284.¹ (e) If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer as provided in subdivision (a). Such refund or credit shall be made either (1) if claim therefor was filed within the period of limitation provided for in subdivision (b) or (g), or (2) if the petition was filed with the Board within four years after the tax was paid, or, in the case of a tax imposed by this Act, within three years after the tax was paid.

SEC. 1000. Title IX of the Revenue Act of 1924 is amended to read as follows:

“TITLE IX.—BOARD OF TAX APPEALS

“MEMBERSHIP OF BOARD

“SEC. 900. The Board of Tax Appeals (hereinafter referred to as the ‘Board’) is hereby continued as an independent agency in the Executive Branch of the Government.

¹ The last sentence of this provision was amended by Section 507 of the Revenue Act of 1928 to read:

“Unless claim for credit or refund, or the petition, was filed within the time prescribed in subdivision (g) for filing claims, no such credit or refund shall be made of any portion of the tax paid more than four years (or, in the case of a tax imposed by this title, more than three years) before the filing of the claim or the filing of the petition, whichever is earlier.”

The Board shall be composed of 16 members, except that such limitation shall not be held applicable to any member holding office under an appointment made before the enactment of the Revenue Act of 1926, in accordance with the law in force prior to the enactment of such Act.

* * * * *

“SEC. 904. The Board and its divisions shall have such jurisdiction as is conferred on them by Title II and Title III of the Revenue Act of 1926 or by subsequent laws. The Board is authorized to impose a fee in an amount not in excess of \$10 to be fixed by the Board for the filing of any petition for the redetermination of a deficiency after the enactment of the Revenue Act of 1926 and for the hearing of any proceeding pending at the time of such enactment.”

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 601. BOARD OF TAX APPEALS—PROCEDURE.

Sections 906 * * * of the Revenue Act of 1924, as amended, are further amended to read as follows.

“SEC. 906. (a) The chairman may from time to time divide the Board into divisions of one or more members, assign the members of the Board thereto, and in case of a division of more than one member, designate the chief thereof. If a division, as a result of a vacancy or the absence or inability of a member assigned thereto to serve thereon, is composed of less than the number of members designated for the division, the chairman may assign other members to the division or direct the division to proceed with the transaction of business without awaiting any additional assignment of members thereto. A division shall hear, and make a determina-

tion upon, any proceeding instituted before the Board and any motion in connection therewith, assigned to such division by the chairman, and shall make a report of any such determination which constitutes its final disposition of the proceeding.

“(b) The report of the division shall become the report of the Board within 30 days after such report by the division, unless within such period the chairman has directed that such report shall be reviewed by the Board. Any preliminary action by a division which does not form the basis for the entry of the final decision shall not be subject to review by the Board except in accordance with such rules as the Board may prescribe. The report of a division shall not be a part of the record in any case in which the chairman directs that such report shall be reviewed by the Board.

“(c) If a petition for a redetermination of a deficiency has been filed by the taxpayer, a decision of the Board dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined by the Commissioner. An order specifying such amount shall be entered in the records of the Board unless the Board can not determine such amount from the record in the proceeding, or unless the dismissal is for lack of jurisdiction.

“(d) A decision of the Board (except a decision dismissing a proceeding for lack of jurisdiction) shall be held to be rendered upon the date that an order specifying the amount of the deficiency is entered in the records of the Board. If the Board dismisses a proceeding for reasons other than lack of jurisdiction and is unable from the record to determine the amount of the deficiency determined by the Commissioner, or

if the Board dismisses a proceeding for lack of jurisdiction, an order to that effect shall be entered in the records of the Board, and the decision of the Board shall be held to be rendered upon the date of such entry.

“(e) If the assessment or collection of any tax is barred by any statute of limitations, the decision of the Board to that effect shall be considered as its decision that there is no deficiency in respect of such tax.

“(f) The findings of the Board made in connection with any decision prior to the enactment of the Revenue Act of 1926 shall, notwithstanding the enactment of such Act, continue to be prima facie evidence of the facts therein stated.”

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Henry W. Hodges

CLERK

IN THE

Court of Appeals, District of Columbia

JANUARY TERM, 1932.

No. 5613

**THE CAPITOL BUILDING & LOAN ASSN.,
APPELLANT,**

vs.

**DAVID BURNET, COMMISSIONER OF INTERNAL
REVENUE, APPELLEE.**

APPEAL FROM THE UNITED STATES BOARD OF TAX APPEALS.

REPLY BRIEF FOR APPELLANT.

**L. L. HAMBY,
*Attorney for Appellant.***

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REPLY BRIEF FOR APPELLANT.

Instead of answering the argument of appellant predicated upon the assignment of error, respondent has evaded the issue. In appellant's brief (7-10) the

basis of the Board's decision was set forth together with the palpable error committed by the Board. No attempt has been made to meet our argument nor to justify the Board's conclusion.

The issue is whether the Commissioner determined a deficiency and when did he send notice thereof by registered mail. The cases cited on page 7 of respondent's brief do not relate to this but simply hold that the Commissioner must determine a *deficiency* before the Board has jurisdiction. That is academic and neither questioned nor at issue here. In all the cases he cites on page 7 the tax determined by the Commissioner was less than that admitted to be due by the taxpayer on a voluntary return filed by him. It is interesting to note in one of those cases (Magdalena W. DeSabichi case, 4 B. T. A. 445) it was held that where the Commissioner has determined a deficiency the Board has jurisdiction to hear the appeal and determine any overpayment even though the tax may have been paid after the appeal was taken and that the same jurisdiction to determine an overpayment by a taxpayer and order a refund to be made to him is extended by the 1926 Act to appeals taken under the 1924 Act which were undetermined at the time of the enactment of the 1926 Act.

Prior to the enactment of the 1926 Act here involved, the 1924 Act did not give the Board jurisdiction to determine an overpayment of the tax. The taxpayer under that Act, if displeased with the Board's decision, could pay the tax and file suit in the District Court or in the Court of Claims to recover. Under the 1926 Act, however, the Board is authorized to redeter-

mine the tax liability of the petitioner and if it be less than the amount of taxes actually paid by him the Board may enter an order of overpayment requiring the Commissioner to refund the excess amount paid, no separate suit in court being necessary. The 1926 Act also provided that once a petition was filed with the Board no court should thereafter take any jurisdiction of the matter except upon appeal. Obviously, since the Board under that Act was given jurisdiction to order refunds, the taxpayer has his election to either appeal to the Board, which would have complete jurisdiction, or to proceed in the District Court or the Court of Claims. If he adopted one course he could not adopt the other.

On page 9 of his brief respondent says that the letter of January 9, 1928, was not a notice of deficiency. He means it was not so styled by the Commissioner as a notice of deficiency for 1925, but that is not the question. Was it in fact a notice from the Commissioner to the taxpayer that the Commissioner had determined the tax liability of the taxpayer in an amount which exceeded that shown by the taxpayer and admitted by him to be the tax upon his return? That is what the law calls a deficiency. In the Continental Accounting & Audit Company case, 2 B. T. A. 761, cited in our brief and in respondent's brief, the Commissioner had assessed an additional tax against the taxpayer before the enactment of the 1924 Act creating the Board of Tax Appeals. The taxpayer filed a claim in abatement of the whole amount of the additional tax so assessed as he was permitted to do under existing law. After the enactment of the 1924 Act, creating the Board

of Tax Appeals, the Commissioner, for the first time, wrote a letter to the taxpayer informing it that he had considered the claim for abatement of the additional taxes assessed and that the claim was rejected. He did not style his letter to the taxpayer a notice of deficiency and in fact asserted that it was not a notice of deficiency but the Board of Tax Appeals held that it was, because it notified the taxpayer of its final liability in an amount which exceeded the amount the taxpayer admitted to be due and exceeded the amount which it had voluntarily set forth on its return. That, the Board said, constituted the assertion of a deficiency. The case at bar is precisely like that except instead of the petitioner here filing a claim in abatement (abolished by the 1926 Act, Sec. 283 K) it elected, as it had the right to do under the 1926 Act, to pay the tax under protest and upon receipt of the deficiency letter from the Commissioner appeal to the Board, which had the right to determine an overpayment in the full amount paid if the taxpayer did not owe the tax. The 1924 Act did not give the Board any authority to find an overpayment or order a refund of taxes and under that Act if the taxpayer paid the tax under any circumstances the jurisdiction of the Board immediately ceased. It was therefore necessary to file claim in abatement of any deficiency and give bond to cover it.

Respondent, on page 11 of his brief, admits that the tax found due in the deficiency letter of January 9, 1928, was \$9,165.54. He must concede, for the stipulation of facts shows, that the taxpayer disclaimed any liability for any tax whatever on the face of its return.

But respondent says that the tax found due in the deficiency letter of January 9, 1928, was not a deficiency because when he made the assessment of the tax in May, 1926, it was for \$9,288.05. He forgets that when he made that assessment he did not notify the taxpayer by registered mail or otherwise, of his determination as required by section 279 of the 1926 Act until January 9, 1928, and then he found he had made a small error in his assessment and merely corrected it, thus finally determining what he considered to be the liability of the taxpayer, namely, \$9,165.54. That, according to the agreed statement of facts (R. 14-15), was the first notice or letter that the taxpayer ever received from the Commissioner subsequent to the filing of its return in 1926. True it is the *collector* of internal revenue in Kansas made demand for payment of the tax which he had the right to do but the collector is not authorized to issue notices of deficiency nor to determine the liability of a taxpayer. He can only collect a tax which the Commissioner has assessed. The law imposes the duty solely upon the Commissioner to issue the notice of his determination and liability and it was not done until January 9, 1928, within sixty days of which the appeal herein was filed, as provided by law.

The case of *William C. Shanley, Jr.*, 7 B. T. A. 521, cited on page 11 of respondent's brief, arose under the 1924 Act and moreover is not analogous to the case at bar. There the taxpayer filed *without protest* a return and voluntarily paid the installment of tax admitted to be due by the return. The Commissioner when he determined the liability of the tax-

payer determined it to be a sum *less* than that represented and shown to be the tax by the taxpayer on his return.

On page 12 of his brief respondent submits that if on the basis of the decision of the Board in the Continental Accounting & Audit Co. case, *supra*, there was a determination of deficiency, the determination occurred in 1926 when the Commissioner assessed the tax and made demand for payment thereof. The law requires the taxpayer to file his appeal to the Board within 60 days after the Commissioner sends him by registered mail a notice of deficiency and the time does not commence to run until the notice is sent (Secs. 274 (a), 279 (b)).

Respondent suggests that the assessment may have been invalid. The assessment was a valid assessment because the Commissioner had the right to make it under Section 279 of the Act and the collector had the right to collect it. The tax which the petitioner paid under protest, therefore, upon demand of the collector was not an amount collected as a deficiency *without* assessment because the collector could not have collected it had it not been assessed.

At the bottom of page 12 respondent says it may be argued that both the assessment and collection in 1926 were illegal and if so the petitioner had no remedy by way of appeal to the Board. That is pure evasion. The tax was legally assessed under Section 279 and legally collected thereunder because within ten days after notice from the collector petitioner was required either to pay the tax or give bond for it and then when the Commissioner subsequently issued his

formal notice to the taxpayer as required by Section 279 appeal may be taken to the Board within sixty days.

On page 13 respondent says that if there was an assertion of deficiency it was done in May, 1926, when the collector demanded payment of the tax and that the taxpayer should have filed his appeal with the Board within sixty days from the time of the collector's demand. That is absurd. How could the taxpayer upon receipt of a demand from the collector to pay the tax assessed within ten days file an appeal to the Board without ever having received the notice from the Commissioner required by Section 279? The Board would have no jurisdiction. Its rules require that there be attached to every petition a copy of the deficiency letter from the Commissioner (see Rule 5 (*h*)).

On page 13 it is suggested by respondent that petitioner may have sought to enjoin the collector from collecting the tax. The law prohibits any such course but requires that the tax be either paid or bond given within ten days. It is next suggested that the taxpayer might have given a bond. That is true but he is not required to do so, for he may elect to pay the tax to stop the running of interest. Respondent next suggests that the taxpayer had the right to file a claim for refund and proceed in court to recover the taxes paid. That is quite true in the case of any notice of deficiency, whether sent under Section 274 (*a*) or 279 (*b*) for a taxpayer may, under the provisions of Sections 3226 and 3228 of the Revised Statutes as amended, elect either to seek his remedy by a direct

proceeding in the District Court or the Court of Claims upon rejection of a claim for refund or he may proceed under Section 274 (a) or Section 279 (b) of the 1926 Act by way of an appeal to the Board of Tax Appeals, and the adoption of either remedy excludes the other.

Since filing our original brief we have noted a very interesting ruling of the Internal Revenue Bureau promulgated subsequent to the issuance of the deficiency letter on January 9, 1928, and reported in Cumulative Bulletin VII-1, page 138, containing the official rulings of the Internal Revenue Bureau published for the guidance of the public and the administrative officers of the Bureau. That ruling, a full copy of which is printed in the Appendix hereto, states that if a taxpayer disclaims any liability for taxes on the face of his return, claiming to be exempt therefrom, and the Commissioner notwithstanding determines that he is liable for taxes and assesses them, such determination is to the full extent thereof a determination of a deficiency and that a deficiency notice to that effect should be sent to the taxpayer by registered mail, giving him the right to appeal to the Board of Tax Appeals. Singular enough, the ruling was made in the case of a building and loan association which claimed exemption under the law. There the Commissioner ruled, and it has ever since been followed, that in such cases a deficiency is:

“the excess of the amount determined to be the correct amount of the tax over the amount shown as the tax by the taxpayer on his return; or, if it is a case where no tax was reported by the

taxpayer, the deficiency is the amount determined to be the correct amount of the tax. While it is true that the association in the instant case computed a tax, the mere filling in of the blanks was not an admission of the tax being due, since the returns so prepared were filed under a specific protest after the Bureau had ruled that the association was not a domestic building and loan association. * * *

And so it is by the Commissioner's own ruling that the determination and assessment of the tax in this case constituted a deficiency and that it was his duty to send the taxpayer a notice by registered mail in accordance with section 274 of the Revenue Act of 1926. That he did not do until January 9, 1928, and he can not complain of the taxpayer's failure to file an appeal to the Board before such a notice was sent; and yet at the bottom of page 13 of his brief he says that the taxpayer could not as the result of that deficiency letter invoke the jurisdiction of the Board but should have done so in 1926 when the assessment was made. The cases he cites at the bottom of page 13 have no bearing upon this issue. The first of them, being the Appeal of Clois L. Greene, 2 B. T. A. 148, arose under the 1924 Act where the taxpayer was required to file a claim for abatement of any tax assessed and give bond to the collector in an amount not exceeding double the amount of the assessment and upon doing so he could then appeal to the Board of Tax Appeals. If he merely filed a claim for abatement with the collector then he was required before filing a petition with the Board to give a bond in an amount to be fixed by the Board of Tax

Appeals. He filed the claim for abatement but he did not support it with a bond because he was financially unable to do so. Under the 1924 Act the law did not impose any duty upon the *Commissioner* to send a notice of an assessment (see Clois L. Greene, 2 B. T. A. 148). Since the taxpayer had given no bond the Board was without jurisdiction under the plain provisions of the 1924 Act.

In the case of Powers et al., 20 B. T. A. 753, the petitions were not filed within sixty days after the Commissioner mailed notices of deficiency and in one instance the petition was not verified by the person to whom the notice was sent. Thus it is clear that respondent has been unable to find a single case to support his contention and this court will not lose sight of the fact that nowhere in his brief does he undertake to quote from the decision of any of the cases cited.

The only mistake the Board made, as pointed out in our original brief, was in its statement that if the amount of tax asserted in a deficiency letter is less than the amount of tax previously assessed and collected it has no jurisdiction. As we have pointed out in our original brief, there is no such language in the statute. The statute says that if the tax asserted in the deficiency letter be less than the tax previously assessed and collected "as a deficiency" the Board has no jurisdiction. The tax previously assessed and collected in this case was not assessed and collected as a deficiency because to be assessed and collected as a deficiency it must be followed by a notice to the taxpayer sent by the Commissioner by registered mail and the failure of the taxpayer within sixty days thereafter to have filed any

appeal to the Board. In other words, had the Commissioner after making the assessment in 1926 promptly sent a notice of deficiency to the taxpayer and had it failed within sixty days after receipt of that notice to file any petition to the Board, but had paid the tax, then it would have been deprived of any right to appeal to the Board by virtue of the letter of January 9, 1928; but the stipulation of facts shows that the Commissioner sent no notice to the taxpayer until January 9, 1928, concerning his final determination of the taxpayer's liability or otherwise and under his own ruling and under the decisions we have cited the determination of the taxpayer's liability in the letter of January 9, 1928, being the first notice ever received from the Commissioner, was a determination of a deficiency because it was a determination of a tax in excess of that admitted to be due by the taxpayer upon his return, and since the appeal was filed within sixty days from the date of sending that notice there can be no question of the Board's jurisdiction.

Respectfully submitted,

L. L. HAMBY,
Attorney for Appellant.

APPENDIX.**Sections 273 and 274—Deficiency in Tax.****ARTICLE 1231: DEFICIENCY DEFINED.**

VII-8-3618. I. T. 2400.

Revenue Act of 1926.

Where a taxpayer at all times claims to be exempt and, denying tax liability, files a return under protest, the mere filling in of the blanks on the return is not an admission of the tax being due. The tax determined to be due by the Bureau under such circumstances, upon the basis of the net income disclosed in the taxpayer's return, represents a "deficiency" within the meaning of section 273 of the Revenue Act of 1926.

The M Building and Loan Association states that it has received from the collector of internal revenue of its district a demand for the payment of income tax for the years 1919 to 1926, inclusive, and that there has been no notice of deficiency issued.

It appears that the association was denied exemption as a domestic building and loan association under section 231(4) of the Revenue Act of 1926 and the corresponding provisions of prior Revenue Acts. Subsequently the association was called upon to file returns for the years with respect to which it failed to establish exemption, and accordingly Form 1120 was prepared and filed for the years 1919 to 1926, inclusive. On each return the association made answers to the various questions and computed a tax, but the returns bore the notation "filed under protest." Upon re-

ceipt of the returns in the office of the collector of internal revenue the taxes were listed for assessment and demand for the payment thereof was made. No notice of deficiency as provided in section 274(a) of the Revenue Act of 1926 was sent to the association.

The association contends that no tax was admitted to be due; and that, although a tax was computed by it in accordance with the net income disclosed in the returns, since the returns were filed under protest and the association claimed to be exempt and denied liability for tax in any amount, the return should be considered as showing no tax due.

In defining the term "deficiency" section 273 of the Revenue Act of 1926 recognizes the case of the taxpayer making a return showing no tax liability and the case where the taxpayer fails to make a return. When a case is considered for the first time, the deficiency is the excess of the amount determined to be the correct amount of the tax over the amount shown as the tax by the taxpayer on his return; or, if it is a case where no tax was reported by the taxpayer, the deficiency is the amount determined to be the correct amount of the tax. While it is true that the association in the instant case computed a tax, the mere filling in of the blanks was not an admission of the tax being due, since the returns so prepared were filed under a specific protest after the Bureau had ruled that the association was not a domestic building and loan association within the meaning of section 231(4) of the Revenue Act of 1926 and the corresponding provisions of prior Revenue Acts. The association at all times claimed to be exempt and denied liability for tax. It is not believed, therefore, that the returns filed by the association should be considered as showing any amount of tax to be due.

In view of the foregoing, it is the opinion of this office that the tax determined to be due by the Bureau

on account of each of the returns filed by the M Building and Loan Association for the years 1919 to 1926, inclusive, constitutes a deficiency within the meaning of section 273 of the Revenue Act of 1926, and that notice of the deficiencies found to be due should be sent to the association by registered mail, as provided in section 274(a) of the Revenue Act of 1926.

(2827)

